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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-1256

TURLOCK IRRIGATION DISTRICT and
MODESTO IRRIGATION DISTRICT,
Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Turlock Irrigation District and Modesto Irrigation District petition for a writ of certiorari to review the opinion and judgment entered by the United States Court of Appeals for the Ninth Circuit on September 25, 1979 in *Turlock Irrigation District and Modesto Irrigation District,* plaintiffs-appellees, and *Cecil D. Andrus, Secretary of the Interior of the United States,* plaintiff-intervenor-appellee v. *City and County of San Francisco,* defendant-appellant, No. 78-1778, and *Turlock Irrigation District and Modesto Irrigation District,* plaintiffs-appellants v. *City and County of San Francisco,* defendant-appellee, No. 78-2859.

OPINIONS BELOW

The opinion of the court of appeals, which is printed in Appendix A, has not yet been reported. The opinion of

the United States District Court for the Eastern District of California, which is printed in Appendix B, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1979. Petitions for rehearing en banc were denied by order of the court of appeals entered on November 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the Congress, by the Raker Act, granted lands of Yosemite National Park to the City and County of San Francisco for development of the Hetch Hetchy water and power system subject to the condition that rates for Hetch Hetchy power sold by the City "shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior," and there is no regulation of such rates by the State of California, may the City unilaterally fix the rates for Hetch Hetchy power without the approval of the Secretary of the Interior?

STATUTE INVOLVED

The Raker Act (Act of Dec. 19, 1913, 38 Stat. 242) is printed in Appendix C. Section 9(o) of the Raker Act specifies that rates for Hetch Hetchy power

> "shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval."

STATEMENT OF THE CASE

In 1913, by the Raker Act, the Congress granted the City and County of San Francisco (the City), subject to specified conditions, certain lands in Yosemite National Park and Stanislaus National Forest for the City's use in developing the Hetch Hetchy water and hydroelectric power system. The purpose of the grant and the conditions imposed therein was to make water and power available and to require the "'lowest possible rate for consumers'" for the benefit of the people in San Francisco, in other cities around the Bay and in the San Joaquin Valley (*U.S.* v. *San Francisco* (1940) 310 U.S. 16, 23-24, 26). To safeguard against the City's charging exorbitant rates for Hetch Hetchy power, the Congress provided, as an important condition to the grant (in section 9(o) quoted above), that the rates would be set by the Public Utilities Commission of the State of California (then the Railroad Commission)[1] or, in the absence of state regulation, with the approval of the Secretary of the Interior.

In 1913, when the Raker Act was enacted, municipal utility operations in California were subject to state regulation by the Railroad Commission (now the Public Utilities Commission). In 1920, the California Supreme Court held in *Pasadena* v. *Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25, that the Commission's jurisdic-

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[1]Mr. Thomson stated in the House: "Under the provisions of paragraph o of section 9, the prices to be charged by the grantee for water or electric energy are under the control of the public utilities commission created by the laws of the State of California" (50 Cong.Rec. 3980). See also statement of Mr. Knowland of California, 50 Cong.Rec. 3920.

tion did not extend to municipal utilities.[2] In the absence of state regulation of rates for Hetch Hetchy power, the alternative in section 9(o) of the Raker Act for rate approval by the Secretary of the Interior became applicable.

The Turlock and Modesto Irrigation Districts (the Districts) are municipal utilities that furnish electric power to farm, business and residential users in the San Joaquin Valley. For over 30 years—ever since this Court's decision in *U.S.* v. *San Francisco* (1940) 310 U.S. 16 ended the City's unlawful disposition of Hetch Hetchy power to Pacific Gas & Electric Company (PG&E) for resale—the Districts have been the principal purchasers of Hetch Hetchy power not used for the City's municipal purposes. The City admits that, throughout all those years, each contract for the sale of Hetch Hetchy power to the Districts was submitted to the Secretary of the Interior for approval of the rates, based on cost of service, set forth therein.

Beginning in 1975, without approval by the Secretary of the Interior, and in violation of the Raker Act, the City increased rates for Hetch Hetchy power to match PG&E rate increases that were due to increasing costs of fuel oil used in PG&E power generation, though the Hetch

[2]On January 7, 1980, the California Supreme Court held in *County of Inyo* v. *Public Utilities Commission* (1980) 26 Cal.3d 154, .. P.2d .., that the Commission's lack of jurisdiction in this regard was statutory, not constitutional, disapproving any contrary language in the *Pasadena* case (p. 164 and n.10).

Hetchy hydroelectric system incurs no fuel oil costs.[3] By letters dated June 30, 1976 the City threatened to withdraw from the Districts the supply of Hetch Hetchy power under existing requirements contracts which extend to 1985 or, in the alternative, to "renegotiate" the contract rates, approved by the Secretary of the Interior pursuant to section 9(o) of the Raker Act, to "current market values" as reflected in PG&E rate schedules.

The Districts petitioned the Secretary of the Interior to take action to enforce the Raker Act, and subsequently filed suit against the City in the Eastern District of California (Civil No. S-77-163 PCW). On May 4, 1977, the Secretary of the Interior issued his decision granting the Districts' petition and sent a letter to the Attorney General asking for enforcement of the Raker Act against the City (copy of decision and letter attached as Appx. D. hereto). In his decision, the Secretary of the Interior stated:

> "By letter of July 27, 1976 to the City, we expressed our view that such action [adoption of PG&E rate schedules] by the City was in violation of the Raker Act for two reasons: First, the new rates had not been approved by the Secretary of the Interior, and second, the new rates were not based upon and related to Hetch Hetchy costs, but instead were based upon market value" (Appx. D, pp. 3-4).

The Secretary of the Interior intervened in support of the Districts in the suit they had filed.[4] In that suit, Judge

[3]The City adopted rate schedules for Hetch Hetchy power which are identical to PG&E rate schedules for PG&E power, including a fuel adjustment clause under which PG&E rates are escalated as costs of fuel oil used for PG&E power generation increase.

[4]After over 30 years of Secretarial approval of the rates for Hetch Hetchy power sold to the Districts, after Secretary Andrus personally signed the above-quoted decision on May 4, 1977 that

Wilkins upheld the rate approval authority of the Secretary of the Interior in a written opinion (Appx. B), and enjoined the City from selling Hetch Hetchy power at rates not approved by the Secretary.[5]

Meanwhile, in a separate suit brought by the City in the Northern District of California against certain airlines who purchase power from the City as its tenants at San Francisco International Airport (Civil No. C-76-1386 CFP), Judge Poole ruled, without a written opinion, that the

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adoption by the City of PG&E rates for Hetch Hetchy power was in violation of the Raker Act, and after over three years of representing to two district courts and the Ninth Circuit that the Raker Act required Secretarial approval of Hetch Hetchy rates, the San Francisco Chronicle and Examiner carried articles on January 23, 1980 reporting that Secretary Andrus had made a "gift" to San Francisco Mayor Dianne Feinstein in a meeting in Washington, D.C. The Examiner article said that Secretary Andrus "has unexpectedly relinquished the historic and frequently onerous power of his office over San Francisco's potentially rich Hetch Hetchy hydroelectric system," and did not intend to ask the Solicitor General to seek review in this Court, in a setting where "one of [Andrus'] top aides is Feinstein's old friend and political ally, Bob Mendelsohn" and where the Mayor announced that she "plans to campaign vigorously for President Carter in the months to come" and that she "was among Carter's earliest and strongest California supporters."

Neither Secretary Andrus nor any Secretary of the Interior may "relinquish" duties imposed upon him by the Congress, in order to make political "gifts" to Mayor Feinstein or someone else, or for any other reason.

[5]Summary judgment motions were filed by the Secretary of the Interior and the Districts. The court granted the Secretary's motion and made the Districts express beneficiaries of the injunction entered on the Secretary's complaint in intervention (Appx. B, pp. 1-2, and see p. 12, n. 6). Judge Wilkins also ruled that the Districts otherwise lacked "standing" until after arbitration of their entitlement to Class 3 power under the contracts (Appx. B, pp. 10-12), and the Ninth Circuit affirmed on that point (Appx. A, pp. 12-13). The Districts' position is that such ruling was clear error, and that they obviously have standing to sue under decisions of this Court such as *Data Processing Service* v. *Camp* (1970) 397 U.S. 150, 152-153, and *United States* v. *SCRAP* (1973) 412 U.S. 669, 683-690).

City could fix rates for Hetch Hetchy power without the approval of the Secretary of the Interior and over the Secretary's objection to the rates.

Appeals in the two cases were consolidated for hearing in the Ninth Circuit. Circuit Judges Merrill and Trask and District Judge Burns sitting by designation reversed Judge Wilkins and held that rate approval by the Secretary of the Interior was not required under section 9(o) of the Raker Act.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Writes Out Of The Raker Act A Basic Condition Of The Congressional Grant.

The Ninth Circuit decision strikes from the Raker Act a basic condition of the grant of lands of Yosemite National Park; overturns a 30-year history of approval by the Secretary of the Interior of rates for Hetch Hetchy power sold to the Districts for use by the cities and citizens they serve; and permits the City to extract windfall profits from the sale of Hetch Hetchy power contrary to the congressional purpose.

While the Raker Act issue at hand intrinsically warrants review by this Court, and the Ninth Circuit interpretation of the Act is clearly erroneous, it is important also that the Districts seek to prevent a plain injustice. For more than 30 years, ever since the Districts commenced the purchase of Hetch Hetchy power from the City, their rates have been submitted to and approved by the Secretary of the Interior pursuant to section 9(o) of the Raker Act. The Districts are the only purchasers of Hetch Hetchy power with rates approved by the Secretary of the Interior. The City now threatens to take available power from the

Districts and supply it to others at rates not approved by the Secretary, in order to secure windfall profits for the City.

The City's unilateral fixing of Hetch Hetchy power rates at PG&E rate levels would make them the highest rates the market could bear, without any consideration of the lower costs of generating hydroelectric power made possible by the grant of Federal park and forest lands. Instead of having the interests of consumers, such as the Districts and their inhabitants, safeguarded either by the State Public Utilities Commission or by the Secretary of the Interior, as the Congress intended, the rate-fixing action in question is that of the City itself, through the City's Public Utilities Commission which under the City Charter is the City department that administers utility services.

The Ninth Circuit observed that city charters have "the force of State law" (Appx. A., p. 5). The question here, however, is not what California courts might deem a state law for local law purposes, but what the Congress of the United States meant in section 9(o) of the Raker Act. The City Charter of San Francisco does not purport to set forth any "law" to which Hetch Hetchy power rates may be said to "conform" as contemplated in section 9(o) of the Raker Act. The Charter simply designates which of the City's administrative departments is responsible for City utility services. Assuming that the Charter amounts to a state law for local law purposes, it does not provide the regulatory safeguards against exorbitant rates for Hetch Hetchy power which the Congress sought to

assure in the Raker Act.[8] Had the Congress intended no more than that San Francisco act as every municipal corporation must act under California law, there would have been no reason to provide for approval of Hetch Hetchy power rates in any instance by the Secretary of the Interior, and the language of section 9(o) would not have been included in the Act. The plain purpose of section 9(o) of the Raker Act was to provide a regulatory check on the authority of the grantee City to fix the rates for power generated as a result of the grant.

In addition to the plain language of section 9(o), the legislative history shows explicitly the congressional intent to require regulatory oversight of Hetch Hetchy power rates.

In the initial bill (H.R. 6281, 63rd Cong., 1st Sess.), the Secretary of the Interior was given the exclusive rate setting authority for Hetch Hetchy power. After hearings and consultation with the then Secretary of the Interior, Franklin K. Lane, the bill that became the Raker Act (H.R. 7207) was introduced. In a letter of July 9, 1913 to Scott Ferris, Chairman of the House Committee on the Public Lands, who presented the bill, Secretary Lane observed that power developed by the City under the Hetch Hetchy grant would fall within the jurisdiction of the California Public Utilities Commission to "suppress any tendency to charge exorbitant rates." In subsequent debate on the bill, Chairman Ferris explained:

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[8]While the City Charter permits City *residents* to object to proposed utility rates, Hetch Hetchy power is used for municipal services (such as the municipal railway) but is not sold to City residents, and the rates in question thus are designed to wring revenues for the City from *non-residents*.

"[I]n regard to certain of the provisions of the bill to prevent extortionate charges, we have had to rely somewhat upon the public utilities commission of the State of California. We did not want to strike off the map the public utilities commission, and we did not want to take away their power to see that no one practiced extortion in respect to the charges for water or power" (50 Cong.Rec. 4110).

Mr. Ferris further stated:

"This bill is safeguarded by public-utility commissions and corporation commissions of the State of California and is absolutely clothed with every conceivable regulation that the entire coterie of departments, Gifford Pinchot, and 20 members of the Committee on Public Lands, who spent some six months examining the matter, could possibly adopt" (50 Cong. Rec. 4092).

• • • • •

"MR. GREGG. They [San Francisco] have the power to sell, and there is a restriction on the price to prevent them from charging an exorbitant price?

"MR. FERRIS. Yes. They have what in our State is called a corporation commission, which will look after that.

"MR. GREGG. The State or Federal law controls, does it not?

"MR. FERRIS. The State steps in and provides the amount or rate which they must charge" (50 Cong. Rec. 4093).

And Mr. Ferris concluded:

This bill leaves the regulation with the State. *The last section lets the public-utilities commission come in and fix what they shall charge so the city of San Francisco can not practice extortion,* but it will enable the people

to get their water supply cheaply and reasonably.[7] *We have worked it out so carefully in the committee, the departments have all considered it, and approve it. I feel sure it is well safeguarded*" (50 Cong.Rec. 4096, emphasis supplied).

The Congress clearly recognized the distinction between *state regulation* of the grantee City and the fixing of rates by the City alone. At the time it was considering the Hetch Hetchy grant to San Francisco, the Congress was aware that the City of Los Angeles, whose Owens River grant was "not dissimilar" to the proposed Raker Act grant to San Francisco (50 Cong.Rec. 3920), had attempted to impose arbitrary rates for persons outside Los Angeles in order quickly to recover project costs, and had been prevented from doing so by the California Railroad Commission. Mr. Knowland of California explained that he expected the Commission to play the same role in connection with the Raker Act grant:

"The Railroad Commission of California, which exercises control over the public utilities of that State, its powers having been broadened by the adoption of a constitutional amendment within the past two years, would unquestionably exercise control over the municipality of San Francisco, having recently declared that it would not allow the city of Los Angeles, whose Owens River water grant is not dissimilar to the one now asked of the Government for San Francisco, to fix arbitrary rates for the sale of water for irrigation pur-

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[7]Senator Norris, a leading sponsor in the Senate, stated that "here will be an instance where the cheapest power on earth will be developed and where it will be sold at cost," and "[h]ere is an instance where it is not intended to make a profit" (51 Cong.Rec. 347).

poses along the lines of its 150-mile aqueduct" (50 Cong.Rec. 3920).

The Ninth Circuit opinion purports to acknowledge "the many instances during the legislative debate when congressmen and senators expressed the view that San Francisco should not be empowered to charge 'exorbitant' or 'extortionate' rates and of the reassurance that the legislators drew from the existence and rate making authority of California's Railroad Commission" (Appx. A, p. 6), but the opinion then inexplicably concludes that, because the California Supreme Court later held that municipalities were not subject to State Public Utilities Commission regulation, the end result is no regulation of Hetch Hetchy power rates, instead of the express alternative in section 9(o) of the Raker Act for rate approval by the Secretary of the Interior. The circuit decision in effect adopts the view of the *opponents* of the rate regulatory provision enacted in the Raker Act. In the course of debate in the Senate, Senator Works of California, who opposed the rate regulatory provision of the Hetch Hetchy bill, urged:

> "MR. WORKS: Mr. President, what should be done with respect to this matter, if the grant is to be made, is simply to make the grant and let the law of California do the balance" (51 Cong.Rec. 185).

The Congress rejected the views of Senator Works but, under the Ninth Circuit decision, they would prevail.[8]

[8]Senators Borah and Sutherland also opposed the regulatory provision. In Senator Borah's view, the Federal government should not step in even though "the State has not performed its function" (51 Cong.Rec. 288). Senator Sutherland concurred that the rate-making provisions of the Act were an "attempt to take out of the hands of the State the policy of inaction" by which the State could

The effect of the Ninth Circuit decision is to write section 9(o) out of the Raker Act, strip the Secretary of the Interior of the authority over Hetch Hetchy power rates exercised for over 30 years, and remove the "careful safeguards" envisioned by the Congress against the City's setting of exorbitant rates for Hetch Hetchy power.

B. In This Case As In U.S. v. San Francisco The Court Should Review A Raker Act Issue Of General Importance.

The Ninth Circuit decision would permit the City to exploit for its sole benefit a grant of national park lands, and thus frustrate a plainly expressed congressional purpose. While the Raker Act affects California, the principles involved are important to the entire nation. The debates in the Congress show that much of the opposition to the Raker Act came from those who stressed that the national park lands included in the grant had been dedicated to the use of all citizens, and who opposed the grant of a special privilege to the City (e.g., 50 Cong.Rec. 3963 (remarks of Mr. Reed); 51 Cong.Rec. 61 (remarks of Sen. Works)). Supporters of the Act responded that the purpose of the grant was to benefit not only the City but all the people in the San Francisco Bay region, at the time about 35% of the total California population:

choose to leave rates for Hetch Hetchy power unregulated and "unaffected in any way except by the action of courts of equity" (51 Cong.Rec. 289). The Congress rejected the views of Senators Borah and Sutherland; the Ninth Circuit decision adopts their views, even to the point of commenting that rates for Hetch Hetchy power fixed by the City would be "subject to judicial review," (Appx. A, p. 6). The California Supreme Court has just pointed out—consistent with the congressional purpose in providing regulatory oversight in the Raker Act—that:

> "Judicial review of rates, however, does not provide protection comparable to PUC proceedings" (*County of Inyo* v. *Public Utilities Commission, supra,* 26 Cal.3d 159).

"What I desire to impress upon this House particularly is the fact that this grant is not for a single city, but for the entire bay region" (50 Cong.Rec. 3920 (remarks of Mr. Knowland));

"It has been stated that this bill is for the benefit of San Francisco alone. That also is incorrect. It expressly is for the benefit of all the cities about San Francisco Bay and also for the very great benefit of the irrigationists* * *" (50 Cong.Rec. 3979 (remarks of Mr. Thomson)).

The City argued in the court below that approval of Hetch Hetchy power rates by the Secretary of the Interior would result in Raker Act benefits being lost to the City, but there is no basis for assuming that the Secretary would not continue to protect the interests of all Raker Act beneficiaries, including the City. The City submitted rates for Hetch Hetchy power sold to the Districts to the Secretary for approval for over 30 years without any sign of objection to the approval procedure. It is precisely because the Congress envisioned "a widespread distribution of benefits" (310 U.S. 30) that the Raker Act provides for Secretarial approval in the contingency that there is no state regulation of Hetch Hetchy power rates.[9]

[9]This Court's emphasis in *U.S.* v. *San Francisco* that Raker Act conditions were to benefit "the people of California" should be contrasted with the acceptance by the panel below of the City's argument that the Act was to benefit only "the people of San Francisco" (Appx. A, p. 8). In *City of Palo Alto* v. *City and Cty. of San Francisco* (9 Cir. 1977) 548 F.2d 1374, Judge Hufstedler's opinion was specific to the point that "'all the cities about San Francisco Bay'" (548 F.2d 1376) were intended to be "equal beneficiaries with San Francisco of the Hetch Hetchy grant" (548 F.2d 1378). The Districts are express beneficiaries of the Raker Act, and sponsors of the Act referred explicitly to its intended benefits to the Districts:

"The bill provides that within the range of the power—that is, down in those irrigation districts and along the bay cities—it shall be furnished at cost to the people who need it, and it could not be furnished any cheaper by anyone else on earth" (50 Cong.Rec. 5494).

The Ninth Circuit opinion turns what this Court said about the purposes of the Raker Act in *U.S.* v. *San Francisco* on its head. The holding in *U.S.* v. *San Francisco* was that the City could not evade the prohibition in section 6 of the Act against selling Hetch Hetchy power to a private corporation for resale by making PG&E the City's "agent" for its distribution. Hetch Hetchy power was being sold at rates for PG&E power "fixed by the State Railroad Commission just as the price of all other power sold by the Pacific Gas & Electric Company in California is fixed" (310 U.S. 27-28). The Ninth Circuit says that the Court's criticism in *U.S.* v. *San Francisco* that the City had "abdicated its control over the sale and ultimate distribution of Hetch Hetchy power" supports a conclusion that the fixing of rates by the City rather than by the State Public Utilities Commission not only is "permitted under the [Raker] Act but would more nearly comport with the congressional intent" (Appx. A, p. 9).

Nothing that the Court said in *U.S.* v. *San Francisco* supports that conclusion by any stretch of reason. The Court's point in striking down the City's sale of Hetch Hetchy power through PG&E was not to prefer City rate-fixing to state rate regulation; rather, it was that the City's marketing of Hetch Hetchy power at PG&E rates violated the intent of the Congress "to require—as a condition of its grant—sale and distribution of Hetch Hetchy power * * * at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company" (310 U.S. 26). The City's present course of action

demonstrates that, if left unfettered by state or Federal regulation, it will once against distribute Hetch Hetchy power at PG&E rates contrary to the congressional intent emphasized by this Court.

In *U.S.* v. *San Francisco,* the Court also unequivocally affirmed the principle that the City, having availed itself of valuable rights granted by the Congress, would not be permitted to defy the conditions upon which those benefits were granted:

> "The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted. • • • [*T*]*he present suit was instituted to enforce covenants exacted from a grantee of rights in the public domain by a Congress sympathetic with the local needs of San Francisco but also jealous of its own responsibility to dispose of such rights in a manner deemed by it most likely to render their benefits widespread*" (310 U.S. 30-31, emphasis supplied).

Even in 1913 the grant which allowed the damming and flooding of Hetch Hetchy Valley in Yosemite National Park was controversial, and rigorous enforcement of the conditions which the Congress attached to the grant was plainly expected. The most basic public interest condition was that the City was not to be allowed to wring windfall profits from sale of the water and power developed pursuant to the grant.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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(Appendices Follow)

Appendices

APPENDIX A

Opinion of the Ninth Circuit Court of Appeals
September 25, 1979

United States Court of Appeals
for the Ninth Circuit

City and County of San Francisco, a municipal corporation, Plaintiff-Appellee, vs. United Airlines, et al., Defendants-Appellants, Department of the Army, Secretary of the Interior, Defendants-Intervenors-Appellants,	Nos. 77-3826 77-3827
Turlock Irrigation District, et al., public agencies of the State of California, Plaintiffs-Appellees, vs. City and County of San Francisco, a municipal corporation, Defendant-Appellant, Cecil D. Andrus, Secretary of the Interior of the United States, Plaintiff-Intervenor, Appellee.	No. 78-1778

Turlock Irrigation District, a public agency of the State of California, and Modesto Irrigation District, a public agency of the State of California,
Plaintiffs-Appellants,
vs.
City and County of San Francisco, a municipal corporation,
Defendant-Appellee.

No. 78-2859

OPINION

[September 25, 1979]

On Appeal from the United States District Courts for the Northern District of California and the Eastern District of California

Before: Merrill and Trask, Circuit Judges, and Burns*, District Judge.

MERRILL, Circuit Judge:

These appeals concern San Francisco's right to establish the rates it charges for power generated at its Hetch Hetchy facility. The specific question is whether the rates it charges must be approved by the Secretary of the Interior under the terms of the Raker Act, 38 Stats. 242 (1913), which granted to San Francisco the rights of way in Yosemite National Park and other public lands necessary to build the Hetch Hetchy water storage and power project. Drawn in question below were rates set and actions taken by San Francisco without having first obtained the Secretary's approval. In Appeal No. 77-3826/3827 (the *Airlines* case) the district court for the Northern

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

District of California held that approval was not required by the Act. In Appeal No. 78-1778 (the *Irrigation District* case) the district court for the Eastern District of California held that approval was required.

Background

In the teens of this century, San Francisco sought to develop a new, municipal water supply. Hetch Hetchy Valley in Yosemite National Park was the site selected for development. San Francisco required Congressional approval for the project because of its location, and The Raker Act, *supra,* resulted. The Act placed a number of conditions on the rights granted to San Francisco and gave the Interior Secretary broad powers to oversee the project. Along with municipal water development, the Hetch Hetchy project was designed to generate hydroelectric power. The issue in each of these appeals relates to power generated by San Francisco at its Hetch Hetchy project in excess of that needed for municipal purposes or dedicated under certain mandatory provisions of the Raker Act. This surplus power is sold by San Francisco to its tenants at San Francisco International Airport (including appellant Airlines), to Norris Industries, Inc., to the Turlock and Modesto Irrigation Districts and to certain industrial customers. In 1975, and again in 1976 and 1977, the San Francisco Public Utilities Commission (San Francisco PUC) approved rate increases for this electric power, setting rates at levels comparable to those charged by Pacific Gas & Electric Company, a privately owned public utility.

The *Airlines* case was commenced when several airline customers of San Francisco refused to pay the increased charges for electric power. Suit was originally brought by San Francisco in the State Superior Court and thereafter was removed by the airline defendants to the United States District Court for the Northern District of California. The Department of the Army intervened as a real party in interest; the increase in electric rates was applied to Norris Industries, Inc., and, by contract, any increased charges were to be passed through to the Army. The Secretary of the Interior was also permitted to intervene in support of his claim that his approval was required as to any rate increases.

Cross-motions for summary judgment were filed and on September 19, 1977, the District Court entered an order granting partial summary judgment in which it determined that "the increased rates charged by [the City] for electric service . . . are not subject to review by and do not require approval of the Secretary of the Interior." The District Court certified the issue decided under 28 U.S.C. § 1292(b), and this Court allowed the appeal.

The *Irrigation District* case was commenced by the districts in March 1977 in the Eastern District of California. The complaint alleged in part that the rates charged by San Francisco for commercial electric power were ineffective since they had not been approved by the Secretary of the Interior. As in the *Airlines* case, the Secretary of the Interior asked for and was granted leave to intervene.

With respect to the Secretary's claim under the Raker Act, the District Court concluded—contrary to the holding

of the Northern District in the *Airlines* case—that under Subsection 9(o) of the Raker Act prior approval of the Secretary is required of rate increases initiated by the San Francisco PUC. It entered an injunction restraining San Francisco "from selling or attempting to sell Hetch Hetchy commercial power to any purchaser for rates in excess of those approved by the Secretary." San Francisco has appealed from this judgment.

Subsection 9(o) of the Raker Act relates to the rates to be charged for power generated at the facility. That subsection provides in part

> "That the rates or charges to be made by the grantee * * * shall at all times *conform to the laws of the State of California* or in the absence of *any such statutory law,* be subject to the approval of the Secretary of the Interior, and in the absence of such law, no rates or charges shall be made, fixed, or collected without such approval * * *." (emphasis supplied)

It is the construction of this language with which we are concerned.[1]

Need for Secretary's Approval

The question before us is the meaning to be attributed to the phrases "laws of the State of California" and "the absence of any such statutory law." If the rates established by San Francisco conform to the statutory law of California then the Secretary's approval is not required.

When the Raker Act was passed in 1913 it was assumed that under California law the state Railroad Commission

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[1]Section 9(m) also provides for approval of rates by the Secretary where rates are not fixed by state law. That subsection, however, has for some years been superseded by 9(o).

(predecessor of the present state Public Utilities Commission) would fix the rates for Hetch Hetchy power. However, in 1920 the California Supreme Court held that under the state constitution the Commission's power to fix rates was limited to privately owned public utilities and that it had no authority to regulate rates fixed by municipal corporations. *City of Pasadena v. Railroad Commission of California,* 183 Cal. 526, 192 P. 25 (1920).

The San Francisco City Charter, Part 10, § 3.590 *et seq.* establishes a Public Utilities Commission. The Charter authorizes the Commission to fix utility rates and expressly prescribes the procedures which must be followed requiring it to hold public hearings after published notice before adopting or revising any rate schedule, § 3.598. Since 1898 it has been recognized in California that a city charter approved by resolution of the legislature has the force of state law. In *Ex parte Sparks,* 120 Cal. 395, 399, 52 P. 715, 716-17 (1898) the Supreme Court stated:

> "It is now expressly provided that the charter may be approved by concurrent resolution, and that then such charter 'shall become the organic law thereof;' that is, it is a special mode for the enactment of a law by the legislature. It is clear that it is made a law by the legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state."

This has now been established as constitutional doctrine, for under Article 11, § 3(a) of the state constitution, city

charters are given the "force and effect of legislative enactments."[2]

It should be noted that the San Francisco Public Utilities Commission does not have complete control or the final say over the rates for Hetch Hetchy power. The same criteria of reasonableness of rates apply to a municipality as apply to private utilities. The rates charged must be "fair, reasonable, just, uniform and non discriminatory • • •" 12 McQuillan, Municipal Corporations § 35.37(a), at 483. Rates charged are subject to judicial review. *See, e.g., City and County of San Francisco v. Western Airlines, Inc.,* 204 Cal.App.2d 105, 22 Cal.Rptr. 216 (1962).

On these bases San Francisco contends that Hetch Hetchy power rates fixed by the City's Public Utilities Commission, subject to judicial review, are fixed under the statute laws of the state and thus need not have the Secretary's approval.

In both appeals San Francisco's adversaries contend, however, that the legislative history of the Raker Act demonstrates that Congress intended the rates charged for the Hetch Hetchy power to be regulated by a state-wide agency or utilities commission. Reference is made to the many instances during the legislative debate when congressmen and senators expressed the view that San Francisco should not be empowered to charge "exorbitant" or "extortionate" rates and of the reassurance that the legis-

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[2]Municipal utilities have also achieved constitutional status. Article 11, § 9(a) of the California Constitution provides in part that "a municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation or means of communication. It may furnish those services outside its boundaries • • •"

lators drew from the existence and rate making authority of California's Railroad Commission. We are thus asked to read the statutory language "laws of the State of California" as limited solely to laws providing for a specific regulatory scheme—one for the fixing of rates by a state Public Utitilies Commission. We cannot accept this construction.

First, we rely on the vigorous debate over the propriety of using the Secretary's approval as a means to assure that Hetch Hetchy rates were not excessive. Congress simply did not intend to create dominant federal control over all aspects of the project. As noted by this court in *Starbuck v. City and County of San Francisco,* 556 F.2d 450, 452 (9th Cir. 1977), the Act "creates a delicate balance between federal interests in the use of federal public lands and state interests in the supply and distribution of water and energy to its citizens." We also noted that "state sovereignty versus federal control over public lands was one of the dominant subjects of debate during Congressional consideration of the Act." 556 F.2d at 453, n.3

In the initial bill the Secretary was given exclusive rate setting authority. Senators Borah, McCumber and Walsh vigorously opposed granting the power to set rates to a federal officer, believing such authority belonged to a sovereign state. After several modifications, a bill was drafted employing the language of the Act as passed. Even this language, which cut back the Secretary's power significantly, drew opposition. We find this exchange between Senator Norris supporting the bill and Senator Borah opposing it:

> "Mr. NORRIS. Then, assuming further that there is *no law* or that there might come a time when there is *no law* in California fixing the rates, does the Senator think *in an emergency of that kind* there ought to be some provision by which the rates *could not be exorbitant or unreasonable*?
>
> "Mr. BORAH. Yes.
>
> "Mr. NORRIS. Then, under a condition of that kind, *assuming that it should arise,* what objection has the Senator to the balance of the provision which gives the right to the Secretary of the Interior?
>
> "Mr. BORAH. My objection is that in the first place we have no power or authority to send a federal officer into a State to perform one of the sovereign functions of a State—that is, to fix rates." 51 Cong.Rec. 288 (emphasis added)

In response to this objection, Senator Norris sought to assure Senator Borah that the conditions which would trigger the secretarial rate-fixing power were exceedingly limited:

> "Mr. NORRIS. I have assumed that the State *has no law.*
>
> • • • • •
>
> • • • That [condition of an absence of state law] *undoubtedly will never arise,* but for the sake of considering the particular provision, I think it is fair to assume that the condition has arisen. I assume it only for the purpose of considering that proposition." *Id.* (emphasis added)

It would appear then, that the language in question was construed by the bill's supporters as providing a very narrow role for secretarial approval; so long as California

maintained a responsible system under law for the fixing of rates the Secretary should not intervene.

Second, the legislative history with reference to 9(o) (and also 9(m), see note 1 *supra*), does not stand alone as a guide to legislative intent regarding rate-making. What motivated Congress was not a desire to prevent the City from profiting from rates charged to customers for surplus power; rather Congress was motivated by a desire to provide the people of San Francisco with the advantages of cheap power and City competition with private power companies such as Pacific Gas and Electric. Rate regulation by the Railroad Commission was simply one recognized means to this desired end.

We draw support for our view that Congress was concerned more with the result than the means to it from *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). That case dealt with a different section of the Act—Section 6, prohibiting sale of power by the City for resale except to municipal power districts. However, the purpose of that section is also relevant to Section 9. The court, with liberal citations from the Congressional Record[3] held that pursuant to the intent to provide cheap power to the people of San Francisco, Section 6 prohibited "assignment" of power by the City to P.G. & E. for delivery to the people of San Francisco. As to this arrangement, the Court noted "the rate paid by consumers for the Hetch Hetchy power is not fixed by the City, as it could

[3]For example, the Court quoted Congressman Kent: "[T]his bill is strictly drawn in the public interest, that there is no possibility of selfish gain, and that no corporation or individual can obtain any benefit whatsoever from this bill. It is for the benefit of the people of California." 310 U.S. at 23.

be under the Constitution of California, it is fixed by the State Railroad Commission just as the price of all other power sold by the Pacific Gas & Electric Company in California is fixed." 310 U.S. at 27-28. In a footnote to that passage the court noted that under the state constitution, municipalities are exempt from rate regulation by the State Commission. *Id.* at 27, n.20. Further, the Court stated "when we look beyond the word description of the arrangement between the City and the power company to what was actually done, we see that the City has—contrary to the terms of § 6—abdicated its control over the sale and ultimate distribution of Hetch Hetchy power." *Id.* at 28.

We read this language of the Supreme Court as expressing the view that the fixing of rates by the San Francisco Public Utilities Commission rather than by the State Commission not only was permitted under the Act but would more nearly comport with the congressional intent.[4]

We conclude that subject to judicial review as to their reasonableness, rates established by the San Francisco PUC pursuant to the City Charter do "conform to the laws of the State of California" in accordance with Section 9(o) of the Raker Act. There is, then, no occasion for securing the approval of the Secretary.

[4]The expectations of Congress that the people of San Francisco would benefit directly through the purchase of cheap power from the City have not been borne out. While the City does use Hetch Hetchy power for municipal purposes, it has never created or acquired the distribution system that delivery to the residents would require. The people have not thought the cost of such a system was justified by the savings in cost of power and numerous bond issues for the acquisition have been defeated. Accordingly, the people now obtain their power from P.G. & E.

Irrigation Districts' Appeal No. 78-2859

For some years San Francisco has been supplying power to the Irrigation Districts. By Section 9(1) of the Raker Act the Districts were given preferred rights to secure power at cost for certain specified purposes. This appeal presents no question as to power provided under that section. By contract San Francisco also supplied additional power to the Districts as it did to other consumers. The dispute presented here arose when San Francisco notified the Districts that it was going to cease providing Hetch Hetchy power and would instead provide power secured at a higher rate from P.G. & E. The Irrigation Districts by their suit sought to enjoin San Francisco from making this change. Before the district court, San Francisco contended that any rights of the Districts to Hetch Hetchy power other than § 9(1) power arose solely by virtue of their contracts with San Francisco; that under these contracts San Francisco had the right to substitute P.G. & E. power; that if the Districts disputed that right the contracts provided that disputes over contract interpretation should go to arbitration. The district court agreed with San Francisco and granted its motion to compel arbitration. The Districts, with the leave of this court, have appealed from that order pursuant to 28 U.S.C. § 1292(b).

The districts rely on Section 10 of the Raker Act which reads "that this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them may judicially enforce in any court of competent jurisdiction."

However, the Act itself gives the Districts no *right* to power—no binding obligation upon San Francisco to provide power—other than § 9(1) power. Any right to power in addition to that exists only by virtue of agreement reached between the Irrigation Districts as customers and San Francisco as supplier. As to such rights the contract controls and under its arbitration clause the dispute as to the City's right to terminate the supply of Hetch Hetchy power must first go to arbitration.

In Appeal No. 77-3826/27 (the *Airlines* case) judgment is AFFIRMED.

In Appeal No. 78-1778 (the *Irrigation Districts* case) upon the appeal of the City of San Francisco, the order of the district court is REVERSED.

In Appeal No. 78-2859 upon the appeal of the Irrigation Districts, the district court is AFFIRMED.

On all appeals, the cases are remanded for further proceedings.

APPENDIX B

Opinion of the United States District Court
for the Eastern District of California
February 8, 1978

United States District Court
For the Eastern District of California

Turlock Irrigation District, et al., Plaintiffs, vs. City and County of San Francisco, Defendant, Cecil D. Andrus, Secretary of the Interior of the United States. Plaintiff-Intervenor.	Civil Action File No. S-77-163 PCW JUDGMENT

[February 8, 1978]

This action came on for trial (hearing) before the Court, Honorable PHILIP C. WILKINS, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, February 7, 1978.

It is Ordered and Adjudged that insofar as defendant City and County of San Francisco has cut off plaintiffs Turlock Irrigation District and Modesto Irrigation District from Class 3 Hetch Hetchy power at prevailing approved contract rates, for the purpose of selling such power to said Districts or other commercial users at rates in excess of those approved by the Secretary of the Interior, de-

fendant is in violation of § 9(c) of the Raker Act, 38 Stat. 244 (1913); and defendant shall be, and hereby is, enjoined from selling or attempting to sell Hetch Hetchy commercial power to any purchaser for rates in excess of those approved by the Secretary.

With reference to the Court's Memorandum and Order in the above entitled case, filed on February 8, 1978, judgment is hereby entered to the extent indicated herein in favor of plaintiff-intervenor, Cecil D. Andrus, Secretary of the Interior of the United States, and against defendant City and County of San Francisco.

Dated at Sacramento, California, this 8th day of February, 1978.

James R. Grindstaff

.....

Clerk of Court

By: L. Minor

.....

L. Minor, Deputy Clerk

Approved as to form:

Philip C. Wilkins

.....

United States District Judge

Date: Feb. 8, 1978

In the United States District Court
For the Eastern District of California

Turlock Irrigation District, a public agency of the State of California, and Modesto Irrigation District, a public agency of the State of California, Plaintiffs, vs. City and County of San Francisco, a municipal corporation, Defendant, Cecil D. Andrus, Secretary of the Interior of the United States, Plaintiff-Intervenor.	Civ. No. S-77-163 PCW

[February 8, 1978]

MEMORANDUM AND ORDER

This is an action filed by Turlock and Modesto Irrigation Districts [hereinafter referred to as "Districts"] under the Raker Act, P.L. 63-41, 38 Stat. 244 (1913), against the City and County of San Francisco [hereinafter, "City"], seeking declaratory and injunctive relief as well as an accounting. Cecil D. Andrus, Secretary of the Interior of the United States [hereinafter, "Secretary"], was granted leave to intervene as party plaintiff by order of this Court filed August 10, 1977, so as to seek enforcement of provisions of the Raker Act.

Presently before the Court are the following motions:

(a) motion by the City to compel arbitration under the arbitration clause of contracts between City and the Districts;

(b) motion by the Districts, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, for partial summary judgment on the declaratory and injunctive relief aspects of their claims; and

(c) motion by the Secretary, also pursuant to Rule 56(a), for summary judgment.

One of the two bases of this complex lawsuit is the Raker Act, an act of Congress in 1913 creating the Hetch Hetchy water and power system for the City, as "grantee" under the Act. The second basis is contracts entered into between the City and the Districts for the supply of electrical power by the former to the latter. The central issue, one of statutory interpretation, is whether the City may sell Hetch Hetchy system power for commercial use to the Districts—or to anyone else—at rates not approved by the United States Secretary of the Interior. For the reasons stated below, this Court is of the opinion that the City may not.

FACTUAL BACKGROUND

In late 1972 and mid-1973, the City entered into contracts with the Irrigation Districts for the supply of electrical power. (These contracts were the most recent in a series of successor contracts between the parties since 1945.) Article 5 of the 1972 contracts provides that the City will supply to Turlock and Modesto power in such quantity as they may require. The power to be supplied is in three types, Class 1 power, Class 3 power and Supplementary

power. [Note: there is no Class 2 power]. These types of power are defined in Article 1 of the contract as follows:

1.2 *Hetch-Hetchy Power* is that power generated by City's generating plants in excess of the quantity required for pumping City's water supply and for City's actual municipal public purposes and which is made available to Turlock [and Modesto] under the terms of this agreement. Hetch Hetchy Power shall be accounted for as Class 1 Power and Class 3 Power as hereinafter defined.

1.21 *Class 1 Power* is that portion of Hetch-Hetchy Power which, under the provisions of the Congressional grant known as the Raker Act, is sold at cost by the City to Turlock [and Modesto] for the use of any landowner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal purposes of the Turlock Irrigation District [or Modesto] and of the municipalities within said District (which purposes shall not include the sale to private persons or corporations).

1.22 *Class 3 Power* is that portion of Hetch-Hetchy Power purchased by Turlock [or Modesto] from City not otherwise defined as Class 1 Power.

1.3 *Supplementary Power* is that power purchased by Turlock [or Modesto] from City which is in excess of Hetch Hetchy Power as hereinbefore defined and which requirement City fulfills by purchase from other sources.

These definitions comport with the Raker Act. Class 1 power is that power described in § 9(1) of the Act,[1] which

[1](1) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said munici-

is supplied to the Districts at cost. Class 3 power is the "excess electrical energy for commercial purposes" noted in § 9(1), the rates of which are governed by § 9(o) of the Act. As this litigation concerns only power for commercial purposes (i.e., Class 3 power from the Hetch Hetchy system and Supplementary Power from other sources), § 9(o) becomes the pivotal section of the Act. Section 9(o) provides:

> (o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and

palities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: *Provided*, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

> accounts, and all the works constructed and property occupied hereunder by the grantee.

Another provision of the contracts between the City and the Districts should be noted: Article 16 provides for binding arbitration on "[a]ll questions arising as to the interpretation and application of the provisions of this agreement and as to the rights and obligations of the City and Turlock [and Modesto] hereunder."

Prior to the energy crisis of recent origin, the rates for Hetch Hetchy commercial power (Class 3 power) were relatively close to the rates charged by PG&E. However, since the onslaught of the energy crisis, PG&E rates have increased dramatically, partially as a result of having to use fossil fuel rather than the hydroelectric source available for Hetch Hetchy.

This fairly recent and increasing rate differential fueled the present litigation, when on June 30, 1976, the City wrote identical letters to the Districts; those letters began as follows:

> You will recall that in our discussion on June 10, I pointed out to you that there is a tremendous disparity in return to City between selling Hetch Hetchy power to the Modesto and Turlock Irrigation Districts under the Class 3 Power rates, and selling it to PGandE assigned industrial customers under current PGandE rates. In light of the disparity, and in view of the fact that we, and the Pacific Gas and Electric Company, have recently reached agreement on an equitable rate for supplementary power and energy, you are hereby advised that beginning July 1, 1976, Class 3 Hetch Hetchy Power will no longer be available to the District, at the current contract rate.

> This withdrawal of Hetch Hetchy Power is being made in accordance with the option allowed the City under Article 1.2 of the agreement between the City and County of San Francisco and the Turlock Irrigation District dated November 6, 1972, which defines Hetch Hetchy Power as 'that power generated by City's generating plants in excess of the quantity required for pumping the City's water supply and for City's actual municipal public purposes, *and which is made available to Turlock under the terms of this agreement.*' (Emphasis added.)

The letters concluded by noting, " . . . I would be happy to meet with you at your earliest convenience to discuss renegotiation of the Class 3 Hetch Hetchy power rates to some value more in keeping with current market values . . . ."

The Districts responded by letters to the City, by petition to the Secretary of the Interior, and by bringing this action; their position was and continues to be that the Raker Act requires the City to supply Hetch Hetchy power (even Class 3 commercial power) at rates appproved by the Secretary, and not unilaterally set by the City so as to extract top market profits.

The City then filed its counterclaim for arbitration, arguing that Article 1.2 of its contracts with the Districts gives it the option to make available *no* Class 3 power to the Districts, replacing all such power with Supplementary Power at the higher PG&E rates. The apparent motivation for the City's exercise of its claimed option is to be able to take the Class 3 power freed from commitment to the Districts, and sell it—*at PG&E rates*—to the City's

other industrial customers. Such motivation is evidenced by the City's June 30, 1976 letters to the Districts.

In response to the Districts' petition for enforcement of the Raker Act, the Secretary issued a decision on May 4, 1977 finding the City's action in violation of the Raker Act. Citing from the City's June 30, 1976 letters, the Secretary noted (at page 3-4 of his decision) that

> [t]he reference to selling Hetch-Hetchy power to 'the PGandE assigned industrial customers under current PGandE rates' is an obvious reference to the action taken by the City in the summer of 1975 to charge these industrial customers for Hetch-Hetchy power in accordance with a rate schedule then in effect for the PGandE Company. By letter of July 27, 1976 to the City, we expressed our view that such action by the City was in violation of the Raker Act for two reasons: First, the new rates had not been approved by the Secretary of the Interior, and second, the new rates were not based upon and related to Hetch-Hetchy costs, but instead were based upon market value.

In short, the Secretary concluded (at page 5) ". . . that a refusal to sell Hetch-Hetchy power at the approved rates solely for the purpose of selling this power to the Districts or to others at non-complying rates is a violation of subsection 9(m) and 9(o) of the Raker Act."[2]

As a consequence of his decision, Secretary Andrus personally requested Attorney General Griffin Bell to insti-

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[2]Subsection 9(m) of the Act cited by the Secretary deals only with that period of time covering the first 20 years following the completion of any portion of the works adapted to the generation of electrical energy; as such, it appears no longer applicable to the instant action. Be that as it may, the Court is of the opinion that § 9(o), whose relevant language is nearly identical to that of § 9(m), is dispositive.

tute an action to enjoin the City from selling or attempting to sell Hetch Hetchy power at rates not in compliance with the Raker Act.[3] Hence, the Secretary's intervention in the instant action.

PLAINTIFFS' STANDING TO SUE

Plaintiff-intervenor, the Secretary, clearly has standing to maintain this action, as provided by § 9(u) of the Act (quoted in fn.3). Any standing under the Act that plaintiff Districts may have, however, must stem from § 10, which provides:

> That this grant, *so far as it relates to the said irrigation districts,* shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction. (Emphasis added.)

As interpreted by the Ninth Circuit in *Starbuck v. City & Cty. of San Francisco,* 556 F.2d 450, 455 (9th Cir. 1977), "Section 10 of the Act was thus included to give those irrigation districts a specific cause of action to enforce their rights."

An examination of the Act, § 9(l) in particular, reveals that the Districts have a *right* to Hetch Hetchy power, at

[3]The Secretary's request was made pursuant to § 9(u) of the Act, which provides:

> . . . [t]hat the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

cost, sufficient to meet their needs relative to the pumping of water and actual municipal purposes (Class 1 power). But there is nothing in the Act stating that the Districts have any right to excess Hetch Hetchy power sold for commercial purposes (Class 3 power). The Secretary's May 4, 1977 decision indicates agreement with this interpretation of the Act.[4]

The type of power that is the subject of this lawsuit is commercial power, which falls under §§ 9(m) and (o) of the Act. Since those sections do not refer to the Irrigation Districts having any rights to the power sold for commercial purposes, section 10 of the Raker Act would seem not to apply. Thus, the Districts do not appear to have standing to control the rates charged for Hetch Hetchy power which is sold for commercial purposes under §§ 9(m) and (o).

While plaintiff Districts do not presently have standing under the Raker Act for the reasons stated immediately above, it is possible that they would have standing to enforce the Act under § 10 *if it is found that they are entitled to Hetch Hetchy commercial power under the contracts*

[4]In their petition to the Secretary, the Districts requested action to compel the City to sell them Class 3 Hetch Hetchy power at the contract rate, rather than selling them Supplementary Power. The Secretary turned down their request, responding as follows:

> . . . we do not find anything in the Raker Act which requires us to approve the City's selection of customers for commercial power. To the extent the Districts believe they have a right to require the City to sell commercial power to them rather than to others, assuming the rates are proper, such right must rest upon their contracts, not upon the statute. Inasmuch as our authority under the Act is limited to the approval of rates, a dispute over questions of contract interpretation of this kind should be referred to arbitration or to the courts. (Page 5 of the decision.)

between them and the City. The Districts have no right to commercial power under the Act; however, the Act may permit them to enforce the rates for commercial power to which they may otherwise be entitled under the contracts.

Thus the Districts, in order to gain possible standing, must first show a right to Hetch Hetchy commercial power under their contracts with the City. This issue is a pure question of contract interpretation (specifically, an interpretation of Article 1.2). Since the parties agreed in Article 16 of their contracts to decide questions of interpretation by arbitration, the arbitration clause appears applicable and should be enforced.[5]

Plaintiff Districts' motion for partial summary judgment is premature and must be denied. The City's motion to compel arbitration must be granted, to the extent of the aforesaid issue: the Districts' right to Class 3 (Hetch Hetchy commercial) power, or alternatively, the City's right to terminate Class 3 power in favor of Supplementary Power.[6]

[5]The Secretary appears to be in agreement on this disposition. See fn.4, above.

[6]The Court notes that even if the Districts are deemed entitled to Class 3 power under their contracts, the Secretary's intervention in the instant action may very well render moot plaintiff Districts' attempt to enforce the Raker Act, because the Secretary will enforce it for them.

PLAINTIFF-INTERVENOR'S SUMMARY JUDGMENT MOTION

The Secretary avers that the City is in violation of § 9(o) of the Raker Act by selling or attempting to sell Hetch Hetchy power to the Districts or to others at rates not approved by the Secretary. The City's response, as revealed in the affidavits of Theodore Chung filed July 15, 1977 and December 6, 1977, is evasive and appears less than fully forthright. However, a close reading of the affidavits would indicate that the City is indeed selling, to some extent, Class 3 Hetch Hetchy power to certain industrial customers assigned by PG&E, and at PG&E rates.

The position of the Districts has consistently been that, to some extent since July 1, 1976, ". . . the City has billed the Districts for certain amounts of Hetch Hetchy power at the rates for PG&E power . . .",[7] a statement never directly denied by the City.

Whether the City has cut off all Class 3 power to the Districts under its interpretation of its contract with them, and is selling that power elsewhere at PG&E rates, or whether some Class 3 power is still being sold to the Districts (but at PG&E rates), one basic fact appears beyond dispute and undenied by the City: that *some* power users are being sold Hetch Hetchy power by the City at rates not approved by the Secretary.

[7]Affidavit of N. Boberg and C. Viss, filed by the Districts May 9, 1977, p.3, l.22-24. The affidavit goes on to provide substantial numerical support for the Districts' position—support gleaned from a comparison of the City's power bills to the Districts with PG&E's bills of Supplementary Power to the City for use by it and for resale.

There being no genuine issue of material fact in dispute, only an issue of law remains: does the Raker Act, and specifically § 9(o), mandate prior rate approval for all rates set by the City for Hetch Hetchy commercial power? The critical passage of § 9(o), quoted in its entirety earlier, states "[t]hat the rates or charges to be made by the grantee [City] . . . for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior . . . ."

Both the Secretary and the Districts agree that by its language, "the laws of the State of California," Congress envisioned that a statewide regulatory body (then, the California Railroad Commission) would act as the primary regulator of Hetch Hetchy power rates. However, in 1920, a scant seven years after the passage of the Raker Act, the California Supreme Court held that municipalities (such as San Francisco) were not subject to regulation by the California Railroad Commission. *Pasadena v. Railroad Commission,* 183 Cal. 526 (1920). Thus there exists no California law controlling the rates charged by the City for the sale of commercial Hetch Hetchy power; the alternative drafted by Congress into § 9(o) must therefore come into play, to wit: approval by the Secretary.

The City takes the position that its city charter, as a law of the state, gives it authority to self-regulate Hetch Hetchy power rates; such reasoning would appear to contravene the legislative intent of Congress at the time it passed the Raker Act and as interpreted by the courts

ever since. A prior version of the bill that later became the Raker Act had initially placed *exclusive* authority for rate approval in the Secretary of the Interior. See H.R. 6281, § 9(o), 50 Cong. Rec. 2143 (1913). After debate, and consultations with the then Interior Secretary, Franklin Lane, the final form of § 9(o) was drafted.[8] During the debate, Chairman Ferris of the House Public Lands Committee gave this explanation:

> In regard to certain of the provisions of the bill to prevent extortionate charges, we have had to rely somewhat upon the public utilities commission of the State of California. We did not want to strike off the map the public utilities commission, and we did not want to take away their power to see that no one practiced extortion in respect to the charges for water and power. 50 Cong. Rec. 4110 (1913).

Such Congressional concern with protecting consumers against extortionate power charges was reiterated by the Supreme Court in 1940, in its interpretation of another section of the Raker Act. In *United States v. City and County of San Francisco,* 310 U.S. 16 (1940), the Court noted, at p.26, that

> Congress clearly intended to require—as a condition of its grant—sale and distribution of Hetch Hetchy power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company.

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[8]The final bill reported out of the House Committee on Public Lands was H.R. 7207. See House Reports, Vol.1, No. 41, 63rd Cong., 1st sess., (1913).

To now allow the City to carry out its intention, expressed in the June 30, 1976 letters, to renegotiate Class 3 Hetch Hetchy power rates to "some value more in keeping with current market values" so as to reduce or eliminate the "tremendous disparity in return to the City" between Class 3 rates and PG&E rates, would destroy the very competition Congress sought to create and the Supreme Court sought to ensure.

In the absence of "the laws of the State of California," § 9(o) of the Raker Act mandates rate approval by the Secretary of the Interior for Hetch Hetchy commercial power. It is significant to note that plaintiff-intervenor alleges, and defendant City admits, that the current (1972-1973) contracts between the City and the Districts were submitted to the Secretary for rate approval, *as were all such contracts between these parties since 1945.* Not until the recent energy crisis pushed up PG&E rates relative to Hetch Hetchy rates did the City seek to sell Hetch Hetchy power without rate approval by the Secretary (presumably for windfall economic profits). Such unapproved sales, or attempted sales, violate § 9(o) of the Raker Act and must cease.

IT IS THEREFORE ORDERED that plaintiff-intervenor's motion for summary judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED that insofar as defendant City and County of San Francisco has cut off plaintiff Irrigation Districts from Class 3 Hetch Hetchy power at prevailing contract rates, for the purpose of selling such power to said Districts or other commercial users at rates

in excess of those approved by the Secretary of the Interior, defendant is in violation of § 9(o) of the Raker Act, 38 Stat. 244 (1913); and defendant shall be, and hereby is, enjoined from selling or attempting to sell Hetch Hetchy commercial power to any purchaser for rates in excess of those approved by the Secretary.

IT IS FURTHER ORDERED that plaintiff Irrigation Districts' motion for partial summary judgment, in that it is presently premature, be, and the same hereby is, denied.

IT IS FURTHER ORDERED that defendant's motion to compel arbitration be, and the same hereby is, granted to the extent consistent with this Memorandum.

DATED: February ...., 1978.

UNITED STATES DISTRICT JUDGE

APPENDIX C

Raker Act (38 Stat. 242)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the city and county of San Francisco, a municipal corporation in the State of California, all necessary rights of way along such locations and of such width, not to exceed two hundred and fifty feet, as in the judgment of the Secretary of the Interior may be required for the purposes of this Act, in, over, and through the public lands of the United States in the counties of Tuolumne, Stanislaus, San Joaquin, and Alameda, in the State of California, and in, over, and through the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating, and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels, and conduits for conveying water for domestic purposes and uses to the city and county of San Francisco and such other municipalities and water districts as, with the consent of the city and county of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this Act; for the purpose of constructing, operating, and maintaining power and electric plants, poles, and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating, and maintaining telephone and telegraph lines, and for the purpose of constructing, operating, and maintaining roads, trails, bridges, tramways, railroads, and other means of locomo-

tion, transportation, and communication, such as may be necessary or proper in the construction, maintenance, and operation of the works constructed by the grantee herein; together with such lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation, and maintenance of said water-power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation, and communication as may be established; together with the right to take, free of cost, from the public lands, the Yosemite National Park, and the Stanislaus National Forest adjacent to its right of way, within such distance as the Secretary of the Interior and the Secretary of Agriculture may determine, stone, earth, gravel, sand, tufa, and other materials of like character actually necessary to be used in the construction, operation, and repair of its said water-power and electric plants, its said telephone and telegraph lines, and its said means of locomotion, transportation, or communication, under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park, and the Stanislaus National Forest: *Provided*, That said grantee shall file, as hereinafter provided, a map or

maps showing the boundaries, location, and extent of said proposed rights of way and lands for the purposes hereinabove set forth: *Provided further*, That the Secretary of the Interior shall approve no location or change of location in the national forests unless said location or change of location shall have been approved in writing by the Secretary of Agriculture.

SEC. 2. That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations, and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: *Provided, however*, That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes of location of said rights of way or lands shall operate as an abandonment by the city and county of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps: *And provided further*, That any rights

inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided for herein: *And provided further*, That with reference to any map or maps heretofore filed by said city and county of San Francisco or its grantor with any officer of the Department of the Interior or the Department of Agriculture, and approved by said department, the provisions hereof will be considered complied with by the filing by said grantee of copies of any of such map or maps with the register of the United States Land Office as provided for herein, which said map or maps and locations shall as in all other cases be subject to the approval of the Secretary of the Interior.

SEC. 3. That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining, or other existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining, or other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell

and of said grantee to purchase such portion or portions of such claims are hereby granted: *Provided, however,* That this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

SEC. 4. That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut, or destroy any timber within the Yosemite National Park or the Stanislaus National Forest, except such as may be actually necessary in order to construct, repair, and operate its said reservoirs, dams, power plants, water-power and electric works, and other structures above mentioned, but no timber shall be cut or removed from lands outside of the right of way until designated by the Secretary of the Interior or the Secretary of Agriculture, respectively; and it shall pay to the United States the full value of all timber and wood cut, injured, or destroyed on or adjacent to any of the rights of way and lands, as required by the Secretary of the Interior or the Secretary of Agriculture: *Provided,* That no timber shall be cut by the grantee in the Yosemite National Park except from land to be submerged or which constitutes an actual obstruction to the right or rights of way or to any road or trail provided in this Act: *Provided further,* That for and in consideration of the rights and privileges hereby granted to it the said grantee shall construct and maintain in good repair such bridges or other practicable crossings over its rights of way within the

Stanislaus National Forest as may be prescribed in writing by the Secretary of Agriculture, and elsewhere on public lands along the line of said works, and within the Yosemite National Park as may be prescribed in writing by the Secretary of the Interior; and said grantee shall, as said waterworks are completed, if directed in writing by the Secretary of the Interior or the Secretary of Agriculture, construct and maintain along each side of said right of way a lawful fence of such character as may be prescribed by the proper Secretary, with such suitable lanes or crossings as the aforesaid officers shall prescribe: *And provided further,* That the said grantee shall clear its rights of way within the Yosemite National Park and the Stanislaus National Forest and over any public land of any debris or inflammable material as directed by the Secretary of the Interior and the Secretary of Agriculture, respectively; and said grantee shall permit any road or trail which it may construct over the public lands, the Yosemite National Park, or the Stanislaus National Forest to be freely used by the officials of the Government and by the public, and shall permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain within the Yosemite National Park and the Stanislaus National Forest, or on the public lands, together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials: *And provided further,* That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences, and other structures not of a temporary character shall be sightly and of suitable exterior

design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

SEC. 5. That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements: *Provided, however,* That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: *Provided further,* That the Secretary of the Interior shall make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond

the control of the said grantee: *Provided further,* That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations.

SEC. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: *Provided,* That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

SEC. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be increased or diminished, pay the sum of $30,000

annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.

SEC. 8. That the word "grantee" as used herein shall be understood as meaning the city and county of San Francisco and such other municipalities or water district or water districts as may, with the consent of the city and county of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act.

SEC. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee:

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute, the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; or, with reference to the Hetch Hetchy Reservoir, in the waters from the reservoir or waters entering the river between it and the "Early intake" of the aqueduct, pending the completion of the aqueduct between "Early intake" and the Hetch Hetchy Dam site.

Fourth. The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee.

Fifth. If at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.

(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.

(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: *Provided,*

however, That at such times as the aggregate daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites; upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: *Provided, however,* That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior, the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: *And provided further,* That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of stored water to be supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reason-

able minimum as will assure the economical and beneficial use of such water.

(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolomne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

(i) That the said grantee shall, at its own expense, locate and construct under the direction of the Secretary of the Interior, such weirs or other suitable structures on sites to be granted, if necessary by the United States, for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may direct, such apparatus and records to be open to inspection by any interested party at any time.

(j) That by "the flow," "natural daily flow," "aggregate daily natural flow," and "what is naturally flowing," as are used herein, is meant such flow as on any given day would

flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed.

(k) That when the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height.

(l) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: *Provided,* That said grantee shall satisfy the needs of the landowners in said irrigation districts for

pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy, as follows: The said grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance

with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do; and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use, and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession

of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior, may determine, above and along the proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch

Hetchy Dam site, and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road, in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and maintain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make

investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

(s) That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.

(t) That the grantee herein shall convey to the United States, by proper conveyance, a good and sufficient title free from all liens and encumbrances of any nature, whatever, to any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act, said conveyance to be approved by and filed with the Secretary of the Interior within six months after the said grantee ceases to use such lands for the purpose of construction or repair under the provisions of this Act.

(u) That the city and county of San Francisco shall sell to the United States, for the use of the War Department, such water as the War Department may elect to take, and shall deliver the same through its system in or near the city of San Francisco to the mains or systems of such military reservations in that vicinity as may be designated by the Secretary of War, under such rules and regulations as he may prescribe. In payment for such water and the delivery thereof the United States shall pay to the said city and county of San Francisco a rental, to be calculated at a fixed rate per one thousand gallons, said rate not to exceed the actual cost of said water to said city and county for all the water so furnished, as determined by

meter measurements: *And provided further*, That payment of said rental shall be made by the local disbursing officer of the War Department in the usual manner: *Provided, however*, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

SEC. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

SEC. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.

Approved, December 10, 1913.

APPENDIX D

Decision of the Secretary of the Interior
May 4, 1977

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF THE INTERIOR

In the Matter of the Rates Approved by the Secretary of the Interior for the Sale of Hetch-Hetchy Power by the City and County of San Francisco to the Turlock Irrigation District	Decision of the Secretary of the Interior
In the Matter of the Rates Approved by the Secretary of the Interior for the Sale of Hetch-Hetchy Power by the City and County of San Francisco to the Modesto Irrigation District	

[May 4, 1977]

The record in this proceeding consists of the "Petition for Enforcement of the Rates Approved by the Secretary of the Interior Under Provisions of the Raker Act" presented jointly by the Turlock Irrigation District and the Modesto Irrigation District (hereafter referred to as the "Districts") on October 29, 1976, with three exhibits; the "Answer of City and County of San Francisco to Petition of the Turlock and Modesto Irrigation Districts" (San Francisco hereafter is referred to as the "City") dated November 10, 1976, with six exhibits, page 4 subsequently corrected; the "Reply of Turlock Irrigation District and Modesto Irrigation District" submitted on November 19, 1976; and copies of the City's letters of November 29, 1976

to the Districts requesting arbitration, and the Districts' reply of December 10, 1976 by counsel rejecting this request. The letters were submitted to us by Districts' counsel by letter of December 13, 1976. We also take notice of our dispute with the City over whether certain Hetch-Hetchy rates adopted in 1975, and subsequent rate actions in 1976, are in compliance with the Raker Act.

It appears that two principal issues are presented, as follows:

1. Is the City refusing to sell Class 3 Hetch-Hetchy Power to the Districts because it wishes to sell such power to the Districts or others at rates which are not in compliance with the Raker Act?
2. Is there a dispute between the parties involving an interpretation of the contracts between the City and the Districts which is an appropriate subject of arbitration?

We believe and find that the answer to the first question is affirmative. The City's letters of June 30, 1976 very clearly express the City's decision that "in light of" the "tremendous disparity in return" to the City between selling Hetch-Hetchy Power to the Districts under the rate for Class 3 Power contained in the Districts' contracts as approved by the Secretary of the Interior in 1974 and "selling it to the PGandE assigned industrial customers under current PGandE rates, . . . Class 3 Hetch-Hetchy Power will no longer be made available to the District, at the current contract rate." The City went on to express a willingness to negotiate a new rate for Class 3 Hetch-Hetchy Power that would be "more in keeping with current market values."

The reference to selling Hetch-Hetchy power to "the PGandE assigned industrial customers under current PGandE rates" is an obvious reference to the action taken by the City in the summer of 1975 to charge these industrial customers for Hetch-Hetchy power in accordance with a rate schedule then in effect for the PGandE Company. By letter of July 27, 1976 to the City, we expressed our view that such action by the City was in violation of the Raker Act for two reasons: First, the new rates had not been approved by the Secretary of the Interior, and second, the new rates were not based upon and related to Hetch-Hetchy costs, but instead were based upon market value. A copy of this letter has been furnished the Districts.

The City has rejected our interpretation of the Raker Act on both grounds. Accordingly, we are referring this matter to the Attorney General in accordance with subsection 9(u) of the Raker Act with the request that he commence the necessary suits or proceedings in the proper court for the purpose of preventing the City from selling, attempting to sell, or offering to sell Hetch-Hetchy power at rates which are not in compliance with the Act. We are including in that submission a further request that the Attorney General take appropriate action to enjoin the City from declining to sell Class 3 Hetch-Hetchy Power to the Districts on the grounds that it wishes to sell Hetch-Hetchy power to the Districts or others at rates that are not in compliance with the Raker Act.

On the second issue stated above, the City asserts, in effect, that it is not bound under the contract to sell Class 3 Hetch-Hetchy Power at all to the Districts and that it

may at its sole option for any reason it chooses decline to make such sales. The Districts, on the other hand, have asked us to take steps to compel the City to sell them Class 3 Hetch-Hetchy Power at the approved rates in the contracts rather than selling them Supplementary Power. As stated above, we conclude that a refusal to sell Hetch-Hetchy power at the approved rates solely for the purpose of selling this power to the Districts or to others at non-complying rates is a violation of subsection 9(m) and 9(o) of the Raker Act. However, we do not find anything in the Raker Act which requires us to approve the City's selection of customers for commercial power. To the extent the Districts believe they have a right to require the City to sell commercial power to them rather than to others, assuming the rates are proper, such right must rest upon their contracts, not upon the statute. Inasmuch as our authority under the Act is limited to the approval of rates, a dispute over questions of contract interpretation of this kind should be referred to arbitration or to the courts.

CECIL D. ANDRUS
Secretary of the Interior

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240
[May 04, 1977]

Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D. C. 20530

Re: Raker Act—Approval of Hetch-Hetchy power rates by the Secretary of the Interior

Dear Mr. Attorney General:

In accordance with subsection 9(u) of the Raker Act of 1913, 38 Stat. 242, 250, we request you to commence necessary suits or proceedings in the proper court to prevent the City and County of San Francisco (City) from (1) selling, attempting to sell, or offering to sell Hetch-Hetchy power at rates not in compliance with the Raker Act, and (2) refusing to sell Hetch-Hetchy power except at rates which are not in compliance with the Raker Act, to the Turlock and Modesto Irrigation Districts for commercial purposes (Class 3 Power).

1. *Hetch-Hetchy rate schedules*

On May 27, 1975, the Public Utilities Commission of the City adopted as its rate schedule, effective July 1, 1975, for Hetch-Hetchy power sold to certain industrial customers and to the San Francisco International Airport a rate schedule identical with the then current rate schedule A-14 of the Pacific Gas and Electric Company. Other sales take place under this schedule or other schedules adopted from other PG&E schedules. This action was taken admittedly

and clearly for the purpose of deriving the maximum revenues from the sale of such power. The rates had no relation to and were not based upon Hetch-Hetchy costs. Thus, for example, the rate schedules contain a fuel adjustment clause even though the City's Hetch-Hetchy operations have no fuel costs. Nor were the new rate schedules approved by the Secretary of the Interior.

By letter of July 27, 1976, with which was enclosed a paper dated July 15, 1976 entitled "Legislative History of Raker Act As It Bears on Rates for Commercial Power," we advised the City that, in our opinion, this action was not in compliance with the Raker Act because such rates had not been approved by the Secretary of the Interior and because they were based on market value, not on cost. The City rejected our position and is pursuing efforts to collect the disputed rates through litigation against Norris Industries, Inc., which operates for the Department of the Army the Government-owned Riverbank Army Ammunition Plant, and against United Airlines, Inc., Trans World Airlines, Inc., and American Airlines, Inc., which are tenants at the International Airport. The City has encouraged resolution of the dispute with us through litigation.

In July 1976 the City similarly raised its Hetch-Hetchy rates again, effective September 1976, by adopting revised PG&E rate schedules.

The Economic Litigation Section previously has been furnished copies of relevant correspondence. This includes but is not limited to our letters of August 12, 1975, July 27, 1976, November 5, 1976, and February 4, 1977, and the City's letters of August 27, 1975, October 7, 1976, and February 10, 1977.

2. *Refusal to sell to Turlock and Modesto Districts*
On January 4, 1974, the Secretary of the Interior approved until June 30, 1985 the rates for the sale of Class 1 and Class 3 Hetch-Hetchy Power to the Turlock Irrigation District under the 1972 contract and to the Modesto Irrigation District under the 1973 contract. The contracts define Class 1 Power as Hetch-Hetchy Power sold at cost for the use of any landowner for drainage or irrigation pumping or for the actual municipal public purposes of the District and of municipalities within the District. Class 3 Power is defined as all other Hetch-Hetchy Power sold to the District. Thus, Class 3 Power is power sold for commercial purposes. The term "Power" includes both power and energy.

By letters of June 30, 1976 to the General Managers of the Turlock and Modesto Irrigation Districts, the City advised the Districts that "in light of" the "tremendous disparity in return" to the City between selling Hetch-Hetchy power to the Districts under the Class 3 rate approved by the Secretary of the Interior and selling it to industrial customers "under current PGandE rates," the Districts were "hereby advised that beginning July 1, 1976, Class 3 Hetch-Hetchy Power will no longer be made available to the District, at the current contract rate." The letter concluded with an offer "to discuss renegotiation of the Class 3 Hetch-Hetchy Power rates to some value more in keeping with current market values."

It is evident that the principal if not the sole reason why the City announced that Class 3 Hetch-Hetchy Power would no longer be sold to the Districts is that the City

wanted to sell such power to the Districts or to other customers at rates that were not in compliance with the Raker Act because they had not been approved by the Secretary of the Interior and because they were based on market value, not on cost. We believe that such grounds for refusing to sell Class 3 Power to the Districts is in violation of the Raker Act.

It should be noted that our request for enforcement action under subsection 9(u) of the Raker Act with respect to refusals to sell Class 3 Power to the Districts is limited to the sole grounds of refusing to sell unless sales can be made at rates which are not in compliance with the Act. Whether other grounds for a refusal to sell Class 3 Power, that are consistent with the Raker Act, exist under the 1972 and 1973 contracts is a matter of contract interpretation which is not our responsibility under the Act.

This matter was called to our attention by a petition of the Districts. The Economic Litigation Section will be furnished a copy of all documents in that proceeding, consisting of the petition, the answer, the reply, and the correspondence relating to a request by the City for arbitration

of the dispute under the contract. Enclosed is a copy of our decision therein.

Sincerely yours,
CECIL D. ANDRUS
Cecil D. Audrus
Secretary

Enclosure

cc: O. L. Moore, Hetch-Hetchy Water & Power
McMorris M. Dow, Deputy City Attorney
Mr. Dellon E. Coker, The Pentagon
Staff Judge Advocate Office, Headquarters,
Sixth U. S. Army
Norris Industries, Inc., Los Angeles
Brobeck, Phleger & Harrison, San Francisco
Pillsbury, Madison & Sutro, San Francisco
Lin H. Griffith, Turlock
Warren F. Gant, Modesto
(w/c of enclosure to all)

Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1256 and 79-1479

In the Supreme Court of the United States

OCTOBER TERM, 1979

TURLOCK IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO

UNITED AIR LINES, INC., ET AL., PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1256

TURLOCK IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO

No. 79-1479

UNITED AIR LINES, INC., ET AL., PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

These actions involve challenges to an increase in rates charged by the City and County of San Francisco for electricity produced by the Hetch Hetchy hydroelectric power project. Petitioners contend that the rates must be approved by the Secretary of the Interior under the terms of the Raker Act.

1. In 1913, Congress passed the Raker Act, ch. 4, 38 Stat. 242, granting San Francisco certain federal lands and rights of way for use in developing a municipal water

supply and hydroelectric power plant in the Hetch Hetchy Valley of Yosemite National Park. Because of congressional concern that Hetch Hetchy power might be sold at unreasonable rates, the Act placed conditions and restrictions on the rates San Francisco may charge its customers.[1] Section 9(m) of the Act, 38 Stat. 248, mandates that rates be based on the municipality's actual cost of operating the system; Section 9(o) mandates that rates "shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval * * *." 38 Stat. 249.

When the Raker Act was enacted, municipally-owned public utilities were regulated by an independent state agency, the California Railroad Commission (predecessor to the California Public Utilities Commission). Congress was keenly aware of this state regulatory authority and intended to rely on the Commission to set reasonable rates for Hetch Hetchy power.[2] In 1920, however, the

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[1]Hetch Hetchy power in excess of that needed for municipal purposes or dedicated under mandatory provisions of the Act is sold by San Francisco to its tenants at San Francisco International Airport (among them the airline petitioners in No. 79-1479), to the Turlock and Modesto Irrigation Districts (petitioners in No. 79-1256), to Norris Industries, Inc., and to other industrial customers (Pet. App. A-3). ("Pet. App." refers to the appendix to the petition in No. 79-1256.) Although Congress anticipated that Hetch Hetchy power would be sold directly to San Francisco's residents, the municipality never developed a suitable distribution system. Therefore, private citizens obtain power from the Pacific Gas and Electric Company (PG&E), a privately-owned utility (Pet. App. A-11 n.4).

[2]See, *e.g.*, 50 Cong. Rec. 3920 (1913) (remarks of Rep. Knowland); 51 Cong. Rec. 55 (1913) (remarks of Sen. Works).

California Supreme Court held in *City of Pasadena* v. *Railroad Commission*, 183 Cal. 526, 192 P. 25, that the Commission lacked jurisdiction over municipal utilities.

Although the record in this case does not disclose how the rates charged by San Francisco for Hetch Hetchy power during the quarter-century following the *Pasadena* decision were set or regulated, it is conceded that beginning in 1946 and continuing into the mid-1970's, all contracts between San Francisco and the irrigation district petitioners were submitted to the Secretary of the Interior for rate approval (Pet. App. B-16).

In July 1975, over the Secretary's express objection that San Francisco could not impose new Hetch Hetchy rates without his prior approval (Pet. App. D-3), the municipality implemented a new and substantially higher rate schedule identical to the schedule of Pacific Gas and Electric Company. Indeed, San Francisco's new rate schedule included a fuel adjustment clause even though Hetch Hetchy power (unlike PG&E power) is hydroelectrically generated (*id.* at D-5 to D-6). Again in September 1976 and a third time in July 1977, San Francisco increased its rates for Hetch Hetchy power by adopting new PG&E rate schedules revised to cover the greatly increasing costs of fuel oil (*id.* at A-3, D-6). None of these rate increases was or has been approved by the Secretary.

2. This litigation began as two separate actions. The "Airlines" case arose when tenants at San Francisco International Airport refused to pay the increased rate charges. After San Francisco brought suit in state court, the action was removed to the United States District Court for the Northern District of California, and the Secretary of the Interior and the Department of the

Army intervened as defendants.[3] On cross motions for summary judgment, the district court "entered an order * * * in which it determined that 'the increased rates charged by [the City] for electric service * * * are not subject to review by and do not require approval of the Secretary of the Interior' " (Pet. App. A-4). The district court then certified the question to the court of appeals pursuant to 28 U.S.C. 1292(b).

The "Irrigation Districts" case was brought by the Turlock and Modesto Irrigation Districts in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief against San Francisco. The Secretary intervened as a plaintiff. Contrary to the holding in the "Airlines" case, the district court held that Section 9(o) of the Raker Act requires prior Secretarial approval of rate increases for Hetch Hetchy power and enjoined San Francisco from selling such power at rates in excess of those approved by the Secretary (Pet. App. B-3 to B-17).

On appeal, the court of appeals consolidated the cases and held that the Secretary's approval of the rate increases is not required under the Raker Act (Pet. App. A-1 to A-13). The court reasoned that Hetch Hetchy power rates are approved by the San Francisco Public Utilities Commission and that the San Francisco PUC was created by the City Charter, which in turn (having been approved by resolution of the state legislature) has

[3]Insofar as Norris Industries, Inc. was subject to the rate increases, the Department of the Army was the real party in interest, because Norris operated a government-owned facility (the Riverbank Army Ammunition Plant) and passed through to the Army all increased charges (Pet. App. A-4, D-6).

the force of state law. Therefore, the court concluded, the rates set by the San Francisco PUC pursuant to the City Charter "conform to the laws of the State of California" within the meaning of Section 9(o) of the Raker Act (*id.* at A-11).

3. The United States agrees with petitioners that the court of appeals erred in its construction of the Raker Act. The plain language of Sections 9(m) and (o) of the Act, together with the Act's legislative history, establish that Congress envisioned that rates charged by San Francisco for Hetch Hetchy power would be reviewed by a statewide regulatory agency and that, should state law not provide for such review, the rates would be subject to approval by the Secretary. The court of appeals' conclusion that rates set by San Francisco's local Public Utilities Commission conform to the laws of California and therefore do not require Secretarial approval flies in the face of congressional intent that there be an independent check on the municipality's authority to set excessive rates for Hetch Hetchy power.

Although we believe the decision of the court of appeals is clearly wrong, we have not petitioned for a writ of certiorari because in our view this case lacks sufficient general importance to justify further review. The decision below does not affect provisions of the Raker Act other than those directly involved here, nor does it affect other programs or projects administered by the Secretary of the Interior. Moreover, while we believe that the court of appeals' decision unjustifiably abandons the rate review mechanism established by Congress, it does not leave San Francisco with unbridled discretion in setting rates for Hetch Hetchy power. Hetch Hetchy rates must be approved by the San Francisco PUC and are then subject

to judicial review in the state courts for reasonableness (Pet. App. A-7). While such review may not provide protection comparable to that envisioned by the Raker Act (see 79-1479 Pet. 8-9), it does serve as a limited check on the kinds of abuse Section 9(o) was designed to stem.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

DOJ-1980-04

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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Petitioners,

vs.

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Respondent.

UNITED AIRLINES, INC., et al.,
Petitioners,

vs.

CITY & COUNTY OF SAN FRANCISCO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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UNITED AIRLINES, INC., et al.,
Petitioners,

vs.

CITY & COUNTY OF SAN FRANCISCO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The City and County of San Francisco, Respondent in the above-entitled cases, respectfully requests the Court to deny the petitions for writ of certiorari seeking review of the Ninth Circuit's decision in these cases.[1]

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[1] The Petition filed by the Turlock and Modesto Irrigation Districts (No. 79-1256) will be referred to herein as "Districts' Pet.", while the Petition filed by United, Trans World and American Airlines (No. 79-1479) will be cited as "Airlines' Pet.". The Appendices to the Districts' Petition will be cited as "Districts' Pet. App.".

QUESTION PRESENTED

Under the Raker Act, which provides that rates for surplus electric power generated by San Francisco shall be "fixed under the laws of California" and that "in the absence of such laws", rates shall be approved by the Secretary of the Interior, does the contingent power of the Secretary to review rates arise where: (1) the rates are set by the San Francisco Public Utilities Commission pursuant to provisions of the San Francisco City Charter, a law of the State of California, which delegates to San Francisco the power to fix rates and prescribes certain procedures which the City must follow; (2) the City's rates must conform to substantive standards of state law which require that rates be reasonable, equitable, and non-discriminatory; and (3) judicial review in the state courts is available to the City's power customers to test whether the foregoing standards have been observed?

STATEMENT OF THE CASE

A. Factual Background.

In 1913, Congress enacted the Raker Act, granting to San Francisco the right to develop and construct a system of dams, reservoirs, and electrical generation facilities within Yosemite National Park and Stanislaus National Forest. P.L. 63-41, 38 Stat. 242 (1913). Pursuant to this grant, San Francisco constructed these facilities, at a cost to it of $169,000,000.[2]

This system—known as the Hetch Hetchy project—generates a substantial amount of electricity. While Congress anticipated that San Francisco would acquire the means of distributing this power directly to its residents, this has not occurred. *See Starbuck v. City and County of San Francisco,* 556 F. 2d 450, 456 (9th Cir. 1977). Bond issues to

[2] Hearings on H.R. 5964 Before the Committee on the Public Lands, House of Representatives, 77th Cong., 2d Sess. 28 (1942) [hereafter "1942 Hearings"].

finance the acquisition or construction of a system for delivering Hetch Hetchy power to the residents of San Francisco have been rejected by the voters. 1942 Hearings, n.2, *supra,* at 82. And the cost of acquiring the means of delivery today would probably be prohibitive. *Starbuck v. City and County of San Francisco, supra.* Thus Hetch Hetchy power cannot be delivered by San Francisco to its citizens so that they might directly enjoy the benefits of this aspect of the Hetch Hetchy project.[3]

San Francisco's initial solution to this problem was to consign the electric power to P.G.&E. for delivery to retail customers in San Francisco. However, in 1940, the Court held that these arrangements violated Section 6 of the Raker Act,[4] which it construed to forbid the consignment as well as the sale of electric power to any corporation or individual, other than a municipality or water district, for ultimate delivery to others. *United States v. City and County of San Francisco,* 310 U.S. 16 (1940).

Because San Francisco can neither obtain its own distribution system nor consign Hetch Hetchy power to P.G.& E. for delivery to its own citizens, it has been forced to realize the benefits of the Hetch Hetchy project it built in another way. San Francisco sells the surplus power to several categories of customers, including the Districts (which purchase the power

[3] Because of this, San Francisco's citizens are forced to rely on the more costly power generated by Pacific Gas & Electric Co. (P.G. & E.).

[4] Section 6 of the Raker Act provides as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: *Provided,* That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

for resale to their customers)[5] and the tenants of the San Francisco Airport, such as the airlines who are petitioners in No. 79-1479.

In the mid-1970's, rates for P.G.& E. power began to rise dramatically, largely as a result of substantial increases in the cost of fossil fuel from which much of P.G.& E.'s electricity is generated. C.T.(TM) 145.[6] In 1975, the Public Utilities Commission of San Francisco approved a new rate schedule which established increased rates for surplus Hetch Hetchy commercial power at levels comparable to those charged by P.G.&E. Stipulation ¶24.[7] These rates were not based on the actual costs of generating and delivering electric power, but rather were related to the market value of the power. Stipulation ¶34. Further increases in rates were approved in 1976 and 1977. Stipulation ¶¶39, 42. The effect of the increases San Francisco has adopted is to increase its revenues from the sale of Hetch Hetchy power (Stipulation ¶33); these revenues are used to defray the costs of other activities within the jurisdiction of the City's Public Utilities Commission (such as the maintenance and operation of the electric power supply of the Municipal Railway) and to reduce the burden upon the taxpayers of San Francisco by transfer of some of these revenues into the general fund. These increased rates have not been approved by the Secretary of the Interior.

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[5] The Districts also purchase "Class 1" power, at cost, for their own use in operating irrigation pumps and for municipal purposes. The Districts have a statutory right to receive this power on a priority basis at cost. Raker Act § 9(1). No issue is presented here concerning the delivery or pricing of Class 1 power.

[6] References to the Clerk's Transcript on Appeal will be cited as "C.T. ___". However, where from the context it may not be clear whether the reference is to the record in the *United Airlines* case or the *Turlock-Modesto* case, citations will be to "C.T. (UA) ____" or "C.T. (TM) ____", respectively.

[7] This reference is to a Stipulation of Facts [hereafter cited as "Stipulation"] in the *United Airlines* case. Apparently because of difficulties in copying, the Clerk did not include it in the Clerk's Transcript on Appeal but instead filed it separately with the Ninth Circuit.

B. The Litigation.

The *United Airlines* case was commenced when several air line customers of San Francisco refused to pay the increased charges for electric power. Suit was originally brought by San Francisco in the San Francisco Superior Court (C.T. 7) and thereafter removed by the defendants to the United States District Court for the Northern District of California. C.T. 1. In their Answers, the airlines contended that San Francisco's rate increases were illegal (1) under state law, because they were "arbitrary, capricious and not supported by substantial evidence"; and (2) under the Raker Act, because they had not been approved by the Secretary of the Interior, as allegedly required by the Act. C.T. 11-12. The Department of the Army intervened in the action, as did the Secretary of the Interior. C.T. 78-84.

After the parties filed cross-motions for summary judgment, the District Court entered an order granting partial summary judgment for the City. It determined that "the increased rates charged by [the City] for electric service . . . are not subject to review by and do not require approval of the Secretary of the Interior." C.T. 188, 189. The District Court certified the issue under 28 U.S.C. § 1292(b) (C.T. 190), and the Ninth Circuit allowed the appeal. C.T. 191. Still pending before the District Court is the issue of whether the rates are reasonable and lawful under California law.[8]

The *Turlock-Modesto* case was commenced by the Districts in March, 1977 in the Eastern District of California. C.T. 1. As in the *United Airlines* case, the Secretary of the Interior asked for and was granted leave to intervene. C.T. 208-225, 338. On February 8, 1978, the District Court entered a Memorandum and Order (C.T. 506) concluding—contrary to the holding of the Northern District of California in the *United Airlines*

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[8] The District Court's order granting only partial summary judgment in effect retained jurisdiction over the airlines' alternative contention that the rates fixed by the San Francisco Public Utilities Commission were "unreasonable" under state law and hence unlawful. *See* R.T. Hearing of September 15, 1977 at 55.

case—that under Section 9(o) of the Raker Act, prior approval of the Secretary of the Interior is required of all rate increases.

On appeal, the Ninth Circuit consolidated the cases for decision, affirmed the District Court's ruling in the *United Airlines* case and reversed in the *Turlock-Modesto* case. It held that the Raker Act does not require the approval of the Secretary of the Interior for San Francisco's commercial power rates. The court rejected the argument of petitioners that because the framers of the Raker Act anticipated that San Francisco's rates would be regulated by the California Railroad Commission, only that particular regulatory scheme would obviate the need for secretarial approval. Districts' Pet. App. at A-8. Relying on the Act's legislative history (*see* pp. 11-13, *infra*), the court concluded that the Act's framers believed that the contingency which would trigger secretarial approval was the "absence" of any form of California law applicable to municipal ratemaking:

> "It would appear then, that the language in question was construed by the bill's supporters as providing a very narrow role for secretarial approval; so long as California maintained a responsible system under law for the fixing of rates the Secretary should not intervene." (*Id.* at A-9-10).

The court concluded that California did indeed maintain "a responsible system under law for the fixing of rates":

> "[T]he San Francisco Public Utilities Commission does not have complete control or the final say over the rates for Hetch Hetchy power. The same criteria of reasonableness of rates apply to a municipality as apply to private utilities. The rates charged must be 'fair, reasonable, just, uniform and non discriminatory * * *' 12 McQuillan, Municipal Corporations §35.37(a), at 483. Rates charged are subject to judicial review. *See, e.g., City and County of San Francisco v. Western Airlines, Inc.*, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962)." (Districts' Pet. App. at A-7).

The Ninth Circuit also relied on this Court's decision in *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). In that case, in considering whether the power consigned by the City to P.G.& E. had, in effect, been sold to P.G.& E., the Court noted that "the rate paid by consumers for the Hetch Hetchy power is not fixed by the City, *as it could be under the Constitution of California*, it is fixed by the State Railroad Commission just as the price of all other power sold by the Pacific Gas & Electric Company in California is fixed." *Id.* at 27-28 (emphasis added). And the Court's ultimate conclusion in that case was that the arrangement between the City and P.G.& E. violated the Raker Act because the City had "abdicated *its control* over the sale and ultimate distribution of Hetch Hetchy power." *Id.* at 20 (emphasis added). The Ninth Circuit stated:

> "We read this language of the Supreme Court as expressing the view that the fixing of rates by the San Francisco Public Utilities Commission rather than by the State Commission not only was permitted under the Act but would more nearly comport with the congressional intent.
>
> "We conclude that subject to judicial review as to their reasonableness, rates established by the San Francisco PUC pursuant to the City Charter do 'conform to the laws of the State of California' in accordance with Section 9(o) of the Raker Act. There is, then, no occasion for securing the approval of the Secretary." (Districts' Pet. App. at A-11).[9]

[9] In a separate portion of its opinion, the Ninth Circuit affirmed the District Court's order denying the Districts standing under the Raker Act and compelling them to arbitrate their dispute with San Francisco. Noting that the Raker Act itself gives the Districts no right to commercial power, the Court held that the Districts' only right to such power was by virtue of the City-District contracts, a right which San Francisco denied existed. Because the contracts contain an arbitration clause, the court held that the dispute between the City and the Districts should be arbitrated. *Id.* at A-12-13.

ARGUMENT

I. THE QUESTION PRESENTED BY THIS CASE DOES NOT WARRANT REVIEW BY THE COURT.

This case presents a question of federal law under a statute which affects only a modest portion of a single state. Five federal judges—the three-member panel of the Court of Appeals and two district judges—have considered this issue and four of them have agreed with the City that there is presently no such "absence of California law" so as to require secretarial approval of San Francisco's commercial power rates. In our view—and in the view of the Secretary of the Interior and the Solicitor General—the matter should be put to rest now.

Stripped to its essentials, this is an intrastate dispute between San Francisco and its commercial power customers over who should gain the benefits of the relatively cheap hydroelectric power generated by the Hetch Hetchy system. How much San Francisco charges these customers is of primarily local concern; federal law is involved only because of the historical and geographical accident that San Francisco's power is generated from land within Yosemite National Park. While commercial consumers of the City's electric power have an interest in cheaper rates, that interest is fully protected under California law which requires that the City's rates be "reasonable". *See* pp. 14-15, *infra*. Even if it were not, protecting commercial consumers in California with regard to locally-

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(Footnote continued)

Although the Districts' claim that this ruling was "clear error" (Pet. at 6), the "questions presented" in their Petition present no issue as to the validity of this portion of the Ninth Circuit's order. Because "[o]nly the questions set forth in the Petition or fairly comprised therein will be considered by the Court" (Sup. Ct. R. 23.1(d)), there is no need to address this issue at this juncture.

generated power is hardly an issue of paramount federal concern, worthy of the Court's attention.

While the Secretary of the Interior has resisted the City's position that his approval of San Francisco's rates is not required under the Raker Act, he has joined with the City in recognizing the inappropriateness of this case for further review by this Court. On January 23, 1980, Secretary Andrus wrote the Department of Justice recommending that the Solicitor General not file a petition for certiorari in these cases. (A copy of this letter is attached as Appendix A to this brief.) The Solicitor General, in turn, has filed a memorandum which states that, in his view, "this case lacks sufficient general importance to warrant further review." Memorandum for the United States at 5.

Two points in Secretary Andrus' letter are worthy of special note. First, the Secretary states that "the proper construction of the Raker Act on [the question of secretarial approval] is a very narrow issue with no implications for any other part of the Raker Act, or any other program of this Department." App. A. 1a-2a. The Solicitor General agrees, stating: "The decision below does not affect provisions of the Raker Act other than those involved here, nor does it affect other programs or projects administered by the Secretary of the Interior." Memorandum for the United States at 5. Second, the Secretary notes that "not seeking review will allow [the Department of the Interior] to avoid becoming involved in local rate setting, an area in which this Department has limited expertise . . . ." App. A, at 2a. As the responsible administrator of the Department of the Interior and the official charged by the Raker Act with monitoring the City's compliance therewith (Raker Act, §9(u)), the Secretary's views as to the lack of importance of this case for the overall administration of the Raker Act and its marginal impact on his Department's prog-

rams are entitled to great deference. *Udall v. Tallman,* 380 U.S. 1 (1965).[10]

The only Raker Act case ever accepted by the Court, *United States v. City and County of San Francisco, supra,* differs from this case in several important respects. In that case, the federal interest in preserving the City's conformity to the Raker Act was asserted by the United States, whose function it is to enforce compliance with the conditions therein contained; here, by contrast, the United States has not only not sought certiorari, but instead suggested that "this case lacks sufficient general importance to justify further review." Memorandum for the United States at 5. Moreover, *United States v. San Francisco* involved important constitutional issues involving the power of Congress over federal property. *See* 310 U.S. at 29-30. This case, by contrast, involves no constitutional issues at all, only a

[10] The Districts suggest in a footnote that the Secretary's views on the "certworthiness" of this case are contradictory to his position on the merits and that this change in position is the result of a political "gift." Districts Pet. at 5-6, n.4. These accusations—which are based on a newspaper account speculating about the Secretary's position rather than on any statement by Secretary Andrus himself—are totally unfounded. There is nothing inconsistent between the Secretary's position on the merits and his views as to the inappropriateness of Supreme Court review. The Court's workload would doubtless be less onerous if more counsel recognized—as has the Secretary—that not every defeat suffered in the courts of appeals warrants a petition for certiorari. Indeed, in making this distinction, the Secretary was acting in the highest tradition of government counsel in this Court. *See* Note, *Government Litigation in the Supreme Court: the Roles of the Solicitor General,* 78 YALE L.J. 1442 (1969) (discussing function of Solicitor General in screening federal government certiorari petitions). Whatever the newspapers may say, Secretary Andrus has neither "relinquished" anything nor bestowed a political "gift"; all he has done is to determine that, from the perspective of his Department, the present case is insufficiently important for the government to petition for certiorari. And the Solicitor General—whose integrity and independence Petitioners have not questioned—agrees with the Secretary of the Interior. *See* Memorandum for the United States at 5-6.

limited question of statutory construction which ultimately turns upon an evaluation of a particular set of state law rules and procedures to determine whether they prescribe ratemaking "under the laws of the State of California." Such a case raises no issues worthy of this Court's attention.

II. THE NINTH CIRCUIT'S DECISION IS CORRECT.

The heart of Petitioners' argument on the merits is that the framers of the Raker Act meant to subject San Francisco's power rate to "regulatory oversight" (Districts' Pet. at 9) by the California Public Utilities Commission (formerly known as the Railroad Commission) or some similar agency and that in the absence of such regulation, the rates are subject to Secretarial approval. The Court of Appeals, however, refused to interpret the Act as requiring "a specific regulatory scheme" to obviate the need for Secretarial approval. Districts' Pet. App. at A-8. The Court of Appeals' decision was correct.

We readily concede that those involved in the drafting and debate of the Raker Act contemplated that rates for Hetch Hetchy electric power would be fixed by the California Railroad Commission. *See, e.g.,* House Hearings 110-11; 50 Cong. Rec. 3920, 3980, 3997, 4000, 4092, 4093, 4096, 4107; 51 Cong. Rec. 55 (1913). It is also apparent that this expectation was in error, for in 1920 the Supreme Court of California ruled that the Commission lacked jurisdiction over the rates charged by municipally-owned utilities. *City of Pasadena v. Railroad Commission,* 183 Cal. 526, 192 P. 25 (1920).

The Court of Appeals correctly held that the Raker Act's language—"under the laws of California" and "conform to the laws of the State of California"—embraces more than a particular state regulatory system. Indeed, the language on which the final wording was based—that proposed by the then Secretary of the Interior—was that rates be fixed by "such legal authority as is *or may be* constituted for fixing rates or charges *in* the State of California." House Hearings at 20-21 (emphasis added). Obviously, the possibility of change in the laws

applicable to ratemaking was contemplated. Nothing in the legislative history suggests that Congress meant to insist that California adhere to any particular form of regulating or fixing electric rates or is inconsistent with the nearly self-evident proposition that Congress meant what it said: that Secretarial approval would not be required so long as California maintained a responsible system under law for the fixing of rates. If Congress had intended to insist upon adherence to a system whereby rates were fixed by the Railroad Commission, it would have said so.

The residual provision allowing the Secretary to determine the rates for power "in the absence of such laws [of California]" (§ 9(m); *see also* § 9(o)) was viewed by Congress in precisely the manner which the language clearly suggests: as a backup in the unlikely event that California ceased to have legal standards or a legal system pursuant to which rates were set. That Sections 9(m) and (o) contemplated this exeedingly narrow role for the secretarial-approval mechanism is made plain in an exchange between Senator Borah (an opponent of the Act) and Senator Norris (who favored it), in what is the most comprehensive discussion of the provision in question in the entire legislative debate. Referring to Sections 9(m) and (o), Senator Borah protested that the power to fix rates was exclusively a state matter, and could not be impaired by federal law. The following colloquy then ensued:

> "Mr. NORRIS. Then, assuming further that there is *no law* or that there might come a time when there is *no law* in California fixing the rates, does not the Senator think *in an emergency of that kind* there ought to be some provision by which the rates *could not be exorbitant or unreasonable?*
>
> "Mr. BORAH. Yes.
>
> "Mr. NORRIS. Then, under a condition of that kind, assuming that it should arise, what objection has the Senator to the balance of the provision which gives the right to the Secretary of the Interior?

> "Mr. BORAH. My objection is that in the first place we have no power or authority to send a federal officer into a State to perform one of the sovereign functions of a State—that is, to fix rates." (51 Cong. Rec. 288 (1913) (emphasis added)).

In response to this objection, Senator Norris sought to assure Senator Borah that the conditions which would trigger the Secretarial rate-fixing power were exceedingly limited:

> "Mr. NORRIS. I have assumed that the State *has no law.*"
>
> . . . .
>
> . . . . That [condition of an absence of State law] *undoubtedly will never arise,* but for the sake of considering the particular provision, I think it is fair to assume that the condition has arisen. I assume it only for the purpose of considering that proposition." (*Id.* (emphasis added)).

The condition which Senators Norris and Borah, and doubtless the entire Congress, thought so unlikely has never occurred. Although the Public Utilities Commission of California does not fix the rates for Hetch Hetchy power, those rates *are* fixed "under the laws of California" (Raker Act §9(m)) and thus "conform to the laws of . . . California" (§9(o)) in ways which, while different from the mechanism envisioned by members of Congress, protect the interests with which Congress was concerned—protection against "exorbitant" or "extortionate" rates—as fully as would have the Railroad Commission.

In the first place, San Francisco's power to fix electric rates is governed by California law. Section 3.598 of the Charter of the City and County of San Francisco confers upon the Public Utilities Commission "the power to fix, charge and adjust rates . . . for the furnishing of service by any utility under its jurisdiction", subject to the oversight of the Board of Supervisors. *See also* Cal. Const., Art. XI, §9(a). A city charter is,

by law, "the law of the State and [has] the force and effect of legislature enactments." Cal. Const., Art. XI, §3. The current San Francisco Charter was submitted to and approved by the Legislature in 1971. Cal. Stats. 1971 Res. Ch. 273. And the Charter expressly prescribes procedures which the Commission must follow in fixing rates:

> "Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges." (Charter § 3.598).[11]

Moreover, San Francisco fixes electric power rates subject to substantive limits imposed by the laws of the State of California and subject to review in state courts of general jurisdiction. The general principles of law governing the fixing of rates for municipally-owned utilities have been summarized as follows:

> "The rates charged by a municipally owned utility must be fair, reasonable, just, uniform and nondiscriminatory, and the same rules in regard to the reasonableness of private utility companies apply. . . . A municipality cannot impose arbitrary charges under penalty of forfeiture of the right to use the supply. A rate retroactively increased has been held to be void. Judicial review may usually be had as to the reasonableness of the rates." (12 McQUILLIN, MUNICIPAL CORPORATIONS, §35.37a at 483-84).

[11] The process for the fixing of electric rates is also governed by the Ralph M. Brown Act. Cal. Gov't. Code § 54950-61. Action must be taken by a majority (*id.* § 54952.6) at a meeting open to the public (*id.* § 54953) subject to specific rules regarding such matters as time, place, and notice to the public. *Id.* §§ 54953-56.

California law adheres to these general principles. Rates must be reasonable and, if they are not, are subject to judicial review in the courts of California. *City and County of San Francisco v. Western Air Lines, Inc.*, 204 Cal. App. 2d 105, 134-41, 22 Cal. Rptr. 216, 234-38 (1962); *Durant v. City of Beverly Hills*, 39 Cal. App. 2d 133, 102 P.2d 759 (1940); *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 593, 93 P. 490, 496 (1908). "'[T]he charges must be reasonable, fair and equitable, must be fixed by ordinances which are not arbitrary, and must be uniform and without discrimination against particular property owners.'" *Boynton v. City of Lakeport Mun. Sewer Dist.*, 28 Cal. App. 3d 91, 94, 104 Cal. Rptr. 409, 411 (1972) (quoting from *Corpus Juris Secundum*). The Supreme Court of California recently acknowledged and approved this body of law. *County of Inyo v. Public Utilities Commission*, 26 Cal. 3d 154, 161 Cal. Rptr. 172 (1980).

Indeed, the airlines' own pleadings refute their claims that there is an "absence of [California] law" governing San Francisco's power rates. In response to the City's allegation that they had refused to pay the increased rates, the airlines filed answers interposing two affirmative defenses. The second of these was that San Francisco's rates had not been approved by the Secretary of the Interior, as allegedly required under the Raker Act. But the airlines' primary affirmative defense was that San Francisco's rate increase was:

> "[a]rbitrary, capricious and not supported by substantial evidence in that it purported to collect from defendant costs not incurred by plaintiff in selling such electric power and energy, being based upon the cost of generating electricity by burning fuel oil when the electricity sold to defendant was in fact generated by hydroelectric plants, and is *therefore unlawful under the laws of the State of California.*" (C.T. 11-12).

The position of the airlines is thus hopelessly contradictory: on the one hand, they contend that San Francisco's rates are invalid under state law and that they are therefore entitled to

judicial relief while, on the other, contending that there is an "absence" of state law governing San Francisco's rates which necessitates secretarial approval. Both positions cannot be right. The airlines' invocation of state law is a tacit admission that those rates *are* governed by the law of California. Thus secretarial approval is not mandated.[12]

In sum, San Francisco does not set rates for Hetch Hetchy power in a legal vacuum. It acts by virtue of authority delegated by the State. It must proceed in accordance with legal processes, including those set forth in the Charter and in the Ralph M. Brown Act. And, perhaps of greatest importance, San Francisco is restrained from enacting "exorbitant" or "extortionate" rates—or, indeed, rates that are simply unreasonable—by substantive standards of state law. Any failure of San Francisco to comply with these procedural or substantive standards is reviewable in the courts of California. The Court of Appeals was therefore correct in concluding that there is no

[12] The matrix of California procedural and substantive law in which San Francisco fixes its rates undermines the extravagant (and for purposes of these petitions, legally irrelevant) claims pressed in the Petitions, which make repeated mention of "windfall profits" (Districts' Pet. at 7, 8, 16) and "exorbitant rates". Districts' Pet. at 3, 8; Airlines' Pet. at 3. State law protects the Districts and the airlines against "exorbitant rates," since that law, in the words of the answers filed by the airline Petitioners, prohibits rates which are "arbitrary, capricious and not supported by substantial evidence." Because rates fixed under state law must be reasonable, Petitioners' fear of being overcharged by the City is chimerical; they have substantive rights under state law which they have every right to assert in the courts of California. Indeed, their claim that the rates charged them by San Francisco are excessive under state law is pending before the District Court in this case.

There is, of course, a disagreement between the parties—which the District Court will have to resolve—over whether San Francisco's rates may reflect the market value of the power or must be based on the actual costs of generation and distribution. That issue was not decided by the Court of Appeals and is not before this Court.

"absence of such laws [of California]" (Raker Act § 9(m)) as gives rise under the Raker Act to the power of Secretarial approval.[13]

The Districts argue that there is a "30-year history of approval by the Secretary of Interior of rates for Hetch Hetchy power sold to the Districts." Districts' Pet. at 7. If this statement is meant to suggest a relevant administrative construction of the Raker Act, the suggestion is wholly without merit.

In the first place, it is undisputed that at no time did the City have a practice of submitting all rates for commercial

[13] The airlines rely on statements in a recent opinion of the California Supreme Court (*County of Inyo v. Public Utilities Commission, supra*) to the effect that there are significant procedural differences between PUC regulation and judicial review of rates for reasonableness. Airlines' Pet. at 8-9. Because "[t]he PUC maintains an expert, independent staff to investigate rate requests," while a court "must depend upon the expert testimony presented by the parties," that court concluded that "while judicial review can protect consumers against plainly unfair rates, [it] does not offer an opportunity for the detailed analysis and careful structuring of rates possible in a PUC proceeding." *Id.* at 159-60, 161 Cal. Rptr. at 715.

The *County of Inyo* case, however, is irrelevant to the present controversy. The California Supreme Court plainly did not hold that judicial review of rates for reasonableness is an ineffective remedy, for the court was careful to note that such review "can protect consumers against plainly unfair rates." *Id.* at 160, 161 Cal. Rptr. at 175. Moreover, the PUC's expertise in rate-setting is irrelevant to this case, for whatever the outcome here, that body will not review the City's rates, for it has no power to do so under state law. That, indeed, is what the *County of Inyo* case holds. Here the rate-setter preferred by Petitioners, the Secretary of the Interior, has stated that his department has "limited expertise" in "local rate-setting". App. A at 2a. Hence Petitioners cannot argue that displacing rate review by the California courts with the Department of the Interior enhances the potential for expert rate-setting comparable to that of a state public utilities commission. Instead, the net effect of displacing the California courts by the Secretary would be to weaken local control over an essentially local controversy without a countervailing gain in expert decision making.

power to the Secretary. It has *never* submitted rates charged to customers other than the Districts (such as the airline Petitioners); until this litigation, the Secretary never asserted that it should. And, as explained to the Court of Appeal (*see* Brief For the City and County of San Francisco at 28-31, n.17), such secretarial review of rates charged the Districts as did occur starting in 1945 was the coincidental result of review by the Secretary of the substantive provisions of *contracts* between the District and San Francisco *which was conducted for a completely different purpose*—namely, to ensure compliance with this Court's mandate in *United States v. City and County of San Francisco, supra;* the Secretary did not purport to review the City's rates under any authority conferred by Sections 9(m) or 9(o) of the Raker Act. Thus, there has never been a consistent pattern of Secretarial review of the City's rates in the entire history of the Hetch Hetchy project, and no prior administrative interpretation of Sections 9(m) or 9(o). Doubtless for this reason, counsel for the Secretary conceded in the District Court that there was no relevant prior administrative practice or interpretation. R.T. (UA) Hearing of Sept. 15, 1977, quoted in Brief For the City and County of San Francisco at 30-31 n.17.

Indeed, if there is any relevance in the history of the administration of the Raker Act by the Department of Interior, it is that from its passage in 1913 until the present dispute in the mid-1970's, the Secretary of the Interior *never* asserted the power to review San Francisco's rates under Sections 9(m) or 9(o) of the Raker Act. The Court of Appeals was correct in declining to require such review at this late date.

The petitions in this case seek review upon a false premise. They base the Question Presented on the premise that "there is *no regulation* of such rates by the State of California . . . ." Districts' Pet. at 2; Airlines' Pet. at 3. We have shown, and the Court of Appeals found, that the State of California *does* regulate the fixing of San Francisco's rates by specifying

procedures to be followed and substantive standards to be observed, all enforceable in the courts of California.

Thus the question which is truly presented here is quite different. It is whether the 1913 Congress intended in effect to *require* California to use a particular process for setting rates—the Railroad Commission—or whether it meant only to require, as the Court of Appeals held, that there be "maintained a responsible system under the law for the fixing of rates . . . ." Districts' Pet. App. at A-10. It is inconceivable that in 1913 Congress had so little regard for the interests of federalism that is would have seen fit to dictate to California the *form* of rate regulation which must be applied to electric power generated at Hetch Hetchy. Accordingly, the judgment of the Court of Appeals is correct.

CONCLUSION

The Petitions should be denied.

DATED: May 13, 1980.

Respectfully submitted,

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City Attorney
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APPENDIX A

Honorable Alice Daniel
Acting Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Re: *City and County of San Francisco v. United Airlines*, Nos. 77-3826, 3827; Nos. 78-1778, 2859 (9th Cir. filed Sept. 25, 1979) (Justice ref: DGL: CMVassanelli)

Dear Ms. Daniel:

After careful consideration, we have decided not to recommend filing a petition for a Writ of *Certiorari* seeking Supreme Court review of the Ninth Circuit's decision. That court held that Hetch Hetchy power rates are fixed under *state law* if they have the approval of the *City's* Public Utilities Commission (P.U.C.) and thus do not require the Secretary of the Interior's approval under subsections 9(m) and 9(o) of the Raker Act, 38 Stat. 224.

The Ninth Circuit rejected our argument that in enacting the Raker Act, Congress intended that the Secretary of Interior review and approve Hetch Hetchy power rates to insure that the purposes of the Raker Act were being observed unless a *statewide* utilities commission, such as the former Railroad Commission of California, had such a rate review and approval role. The court also recently denied, without formal opinion, the government's request for rehearing in the above-cited case.

It seems to us that (1) the Court of Appeals' decision is not so wrong on its face as to require Supreme Court review; (2) the proper construction of the Raker Act on this point is a very narrow issue with no implications for any other part of the

Raker Act, or any other programs of this Department; (3) the equities of this case do not cut sharply against the city; at bottom, the issue is whether the city, or its customers for surplus power (including an airline and other airport tenants, two irrigation districts and industrial concerns), should receive the benefit of the relatively cheap Hetch Hetchy hydroelectric power; (4) not seeking review will allow the Secretary to avoid becoming involved in local rate-setting, an area in which this Department has limited expertise; and (5) not seeking review of such a narrow question would conserve the limited resources of the Supreme Court for more appropriate cases.

As you know, other parties adversely affected by the Ninth Circuit decision may seek Supreme Court review; therefore, I ask that you keep my Deputy Solicitor, Mr. Ferguson, advised of the status of the case. If the United States' views are to be offered to the Supreme Court, I trust we will be consulted beforehand.

Sincerely,

/s/ CECIL B. ANDRUS
Secretary

cc: Kenneth Geller
Deputy Solicitor General

Supreme Court, U. S.
FILED
MAY 16 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1256

TURLOCK IRRIGATION DISTRICT and
MODESTO IRRIGATION DISTRICT,
Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court
OF THE
United States

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The Solicitor General of the United States states that "the decision of the court of appeals is clearly wrong" and "flies in the face of congressional intent" in the Raker Act, explaining:

> "The United States agrees with petitioners that the court of appeals erred in its construction of the Raker Act. The plain language of Sections 9(m) and (o) of the Act, together with the Act's legislative history, establish that Congress envisioned that rates charged by San Francisco for Hetch Hetchy power would be reviewed by a statewide regulatory agency and that, should state law not provide for such review, the rates would be subject to approval by the Secretary. The court of appeals' conclusion that rates set by San

> Francisco's local Public Utilities Commission conform to the laws of California and therefore do not require Secretarial approval flies in the face of congressional intent that there be an independent check on the municipality's authority to set excessive rates for Hetch Hetchy power" (Memorandum for the United States, p. 5).

The Solicitor General then, however, apparently influenced by the Secretary of the Interior (see Appx. A to the City's brief),[1] suggests that the case may lack such "general importance" as to justify review (Memorandum for the United States, p. 5).

It is plain, we submit, that review should be granted in this case because it involves the same issue of national policy as *U. S.* v. *San Francisco* (1940) 310 U.S. 16. The City purports to distinguish this Court's prior review of the Raker Act in *U.S.* v. *San Francisco* with the assertion that that case "involved important constitutional issues involving the power of Congress over Federal property" while this case "involves no constitutional issue at all" (City brief, p. 10). In transparent truth, both cases involve the same issue of whether the Court will require the enforcement, and not permit the derogation in the court of appeals, of conditions imposed by the Congress in a perpetual grant of Federal lands and rights. In *U. S.* v. *San Francisco,* after observing that "Article 4, § 3, Cl. 2 of the

[1]A basic responsibility of this Court is preservation of the rule of law. This Court does not sit to allow a Secretary of the Interior to "relinquish" statutory responsibilities, whether to advance passing political purposes (see the Districts' petition, n. 4, pp. 5-6) or because of a claimed lack of regulatory "expertise" (see City br., p. 9). The rule of law does not permit Federal grants, to San Francisco or New York or any other city, to be stripped of conditions specified by the Congress.

Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States'," this Court reversed the court of appeals and stated:

> "The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted. * * * [T]he present suit was instituted to enforce covenants exacted from a grantee of rights in the public domain by a Congress sympathetic with the local needs of San Francisco but also jealous of its own responsibility to dispose of such rights in a manner deemed by it most likely to render their benefits widespread" (310 U.S. 30-31).

The City's attempted evasion of a Raker Act condition in this case would have the same adverse result as its attempted evasion in *U. S.* v. *San Francisco,* namely, instead of making Hetch Hetchy power available at low cost in competition with PG&E power, the City would be selling Hetch Hetchy power at PG&E rates, contrary to the congressional intent. Unless the congressional intent is given effect, not only will this generation of Hetch Hetchy power users be mulcted by the City, so will future generations.

It was precisely to assure that Hetch Hetchy power would be supplied at low rates based upon the cost of hydroelectric generation that the Congress did not leave the City free of rate oversight by state authorities or the Secretary of the Interior. The City's suggestion that "regulation of Hetch Hetchy power rates under state law" meant only that the State of California must have a judicial

system that can generally review whether City conduct is authorized by state law is plainly wrong.[2] Assuming that the Raker Act would permit more than one type of state regulation, the City concedes that there is *no* statewide regulatory control over Hetch Hetchy power rates (City br., p. 11). The alternative specified by the Congress—rate approval by the Secretary of the Interior—is thus clearly applicable (see the Memorandum for the United States, p. 5, and the Districts' petition, pp. 9-13).

Correction of a manifest error in this case will be accompanied by prevention of a manifest injustice. In the process of attempting to wring windfall profits from Hetch Hetchy power, contrary to the declared congressional purpose,[3] the City is threatening serious economic impact on the Districts' residents, who since 1945 have been the principal

[2]The City summarizes its argument as follows: "In sum, San Francisco does not set rates for Hetch Hetchy power in a legal vacuum. It acts by virtue of authority delegated by the State" (City br., p. 16). Obviously, *all* actions of the City must be pursuant to authority delegated by the State. That has nothing whatever to do with the regulatory conditions imposed on Hetch Hetchy power rates by the Congress in the Raker Act.

[3]That San Francisco, along with New York, Chicago and other cities, has problems of municipal finance is not a permissible basis for striking conditions from a Federal grant, nor is an effort to derive excess profits from Hetch Hetchy power a practical or sensible solution to San Francisco's financial problems.

users of Hetch Hetchy power at rates approved by the Secretary of the Interior.[4]

The petition should be granted.

Respectfully submitted,

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[4]The City's assertion that the Secretary of the Interior "did not purport to review the City's rates [in contracts with the Districts] under any authority conferred by sections 9(m) and 9(o) of the Raker Act" (City br., p. 18) is false. The City *admitted* in its answer to allegations of paragraph 6 of the Districts' complaint that "Defendant [City] submitted [the current] contracts as it has submitted all such prior contracts with plaintiff irrigation districts to the Secretary of the Interior of the United States, *who approved the rates set forth therein pursuant to provisions of the Raker Act*" (emphasis supplied).